TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 542.

THE CUYAHOGA RIVER POWER COMPANY, PLAINTIFF IN ERROR,

vs.

THE NORTHERN REALTY COMPANY AND THE NORTHERN OHIO TRACTION & LIGHT COMPANY.

IN ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT OF CUYAHOGA COUNTY, STATE OF OHIO.

FILED SEPTEMBER 3, 1908.

(25,078)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 342.

THE CUYAHOGA RIVER POWER COMPANY, PLAINTIFF IN ERROR,

vs.

THE NORTHERN REALTY COMPANY AND THE NORTHERN OHIO TRACTION & LIGHT COMPANY.

IN ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

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1 Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

TRANSCRIPT FROM PROBATE COURT.

THE STATE OF OHIO,
Summit County, ss:

In the Probate Court.

Docket and Journal Entries.

No. 4298.

THE CUYAHOGA RIVER POWER COMPANY
vs.
THE NORTHERN REALTY COMPANY.

Appropriation of Real Property.

Jan. 20, 1911, Petition and præcipe filed at 4.08 P. M. and summons issued to Sheriff; hearing Feb. 3, 1911, at 10 A. M. J. 45, p. 394.

Jan. 23, 1911, Summons returned by Sheriff served.

Feb. 3, 1911, Motion of The Northern Realty Company to have service of summons set aside filed. J. 45 p. 440.

Feb. 8, 1911, Motion of Sheriff to amend his return made upon the summons filed; hearing had and Sheriff granted leave to file amended return, which he does accordingly and hearing continued to Feb. 23, 1911, at 10 A. M. J. 45 p. 455.

Feb. 23, 1911, Motion of defendant to dismiss this action filed, and hearing continued to March 7, 1911, at 10 A. M. J. 45 p. 501.

Mar. 7, 1911, hearing continued. J. 45 p. 537.

Mar. 31, 1911, Depositions taken before Wellington J. Griffith, Notary Public, Seneca Co., Ohio, received and filed, and opened upon request of N. O. Mather, Atty. for defendant.

2 May 10, 1911, Motion of defendant to have plaintiff give security for costs filed. J. 46, p. 106.

May 11, 1911, Motion of defendant filed February 23, 1911, to have petition dismissed overruled; to which finding and order said defendant excepts; and oral motion of plaintiff to dismiss petition, for the reason that the description of the real estate described in the petition is not specific, sustained and petition dismissed; to which finding and order plaintiff excepts. J. 46, p. 108.

3 FRIDAY, January 20, 1911.

Journal 45, Page 394.

Petition for the Appropriation of Real Property.

This day at 4:08 P. M., o'clock came The Cuyahoga River Power Company and presented its petition in this court against The Northern Realty Company, defendant, praying for the appropriation of certain real estate of defendant described in said petition; which petition being duly verified by oath is placed on file.

And, in accordance with the precipe attached to said petition, our summons is now issued to the Sheriff of said County for said defendant, notifying it of the filing and prayer of said petition, and that the same will be heard in this court on Feb. 3rd, 1911, at ten o'clock A. M. (J. E. Furnished.)

O. E. LYTLE, *Judge.*

FRIDAY, February 3, 1911.

Journal 45, Page 440.

Proceedings for the Appropriation of Real Property.

This day The Northern Realty Company filed its motion in this court to have the Sheriff's return of service of summons herein set aside. And it is ordered that this matter be continued.

O. E. LYTLE, *Judge.*

4 WEDNESDAY, February 8, 1911.

Journal 45, Page 455.

Proceedings for the Appropriation of Real Property.

This cause came on to be heard upon the motion of the defendant to set aside the service of summons in the above entitled action, and thereupon the said Sheriff of Summit County, Ohio, moved the Court for leave to amend his said return according to the fact, whereupon the Court grants leave to said Sheriff to amend said return. Thereupon said Sheriff made return upon said summons as follows, to-wit:

"THE STATE OF OHIO,
Summit County, ss:

Received this writ January 21, A. D. 1911, at 8:00 o'clock A. M., and pursuant to its command, on January 21, 1911, I served the within writ by delivering a true copy thereof, with all endorsements thereon, to Will Christy, President of the Northern Realty Company, at his office in the Hamilton Building, in the City of Akron, Summit County, Ohio."

To all of which order and judgment of the Court defendant, The Northern Realty Company, here and now excepts.

And it is ordered that the hearing on the preliminary questions involved herein be continued to February 23, 1911, at ten o'clock A. M. (J. E. Furnished.)

O. E. LYTLE, *Judge.*

5

THURSDAY, February 23, 1911.

Journal 45, Page 501.

Proceedings for the Appropriation of Real Property.

This day the defendant, The Northern Realty Company, filed its motion in this court to have this case dismissed. It is therefore by the Court ordered that the hearing on the preliminary questions involved herein be continued to March 7, 1911, at ten o'clock A. M.

O. E. LYTLE, *Judge.*

TUESDAY, March 7, 1911.

Journal 45, Page 537.

Proceedings for the Appropriation of Real Property.

It is now by the Court ordered that this matter be continued.

O. E. LYTLE, *Judge.*

WEDNESDAY, May 10, 1911.

Journal 46, Page 106.

Proceedings for the Appropriation of Real Property.

This day the defendant, The Northern Realty Company, filed its motion in this court to have the plaintiff give security for costs in this case.

O. E. LYTLE, *Judge.*

6

THURSDAY, May 11, 1911.

Journal 46, Page 108.

Proceedings for the Appropriation of Real Property.

This cause coming on to be heard on the motion of the Defendant filed in this cause on the 23rd of February, 1911, to dismiss this action and strike Plaintiff's petition from the files, to the consideration of which motion the Plaintiff objected; and it appearing to the Court that, after the filing of the motion, but before the disposition thereof hereinafter made, the former action referred to in said motion

was dismissed by the Plaintiff therein, it is adjudged and ordered that said motion be and the same is hereby overruled, to which judgment and ruling of the Court the Defendant here and now excepts. (J. E. Furnished.)

O. E. LYTLE, *Judge.*

Proceedings for the Appropriation of Real Property.

This cause came on for hearing, and, thereupon, the Defendant, The Northern Realty Company, moved to dismiss the petition of the Plaintiff herein for the reason that said petition does not contain a specific description of the property sought to be appropriated in this action, and that said description of the property so sought to be appropriated by the Plaintiff, is uncertain and indefinite.

Whereupon, said motion was argued by counsel, and submitted to the Court; and the Court, upon consideration, sustains the same and dismisses the Plaintiff's petition, to which order, judgment, and ruling of the Court the Plaintiff excepts.

It is hereby ordered and adjudged that the plaintiff pay the costs herein, taxed at $—, to which order and judgment the
7 Plaintiff excepts. (J. E. Furnished.)

O. E. LYTLE, *Judge.*

(Duly certified.)

8 "EXHIBIT A."

In the Probate Court of Summit County, Ohio.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
vs.
THE NORTHERN REALTY COMPANY, Defendant.

Petition.

Jan'y 20, 1911.

Plaintiff says it is a corporation and was duly organized and incorporated under and in pursuance of the laws of the State of Ohio, under the corporate name of The Big Cuyahoga Light, Heat & Power Company. That afterwards, but due process of law, its corporate name was changed to The Cuyahoga River Power Company. Plaintiff says that the Defendant is a corporation duly organized under the laws of the State of Ohio, whose chief place of business is Akron, Summit County, Ohio.

Plaintiff says that by the terms of its charter it is authorized and empowered to acquire, erect, build, maintain and operate a system of dams in the Big Cuyahoga river in the State of Ohio, to raise and maintain a head of water; to construct and maintain canals, locks, and raceways; to regulate and carry said head of water to its plants or power houses where electricity is to be generated; to erect and maintain a line of poles whereon to attach or string wires or cables to

carry and transmit electricity; to acquire, produce, manufacture, generate, and sell electricity for light, heat, power and other purposes; to acquire, hold and sell franchises and privileges, and supply the same to municipal corporations; to acquire by condemnation, lease, purchase, or otherwise, and to possess, hold, and sell such real estate and personal property as may be necessary for the proper conduct of said business, and to do any and all other things necessary and incident to any of its said purposes.

That said system of dams, poles, lines and power stations, canals, locks, and raceways, which this company proposes to construct, maintain, and operate, commences at the confluence of the Big and Little Cuyahoga rivers in Summit County, Ohio, and extends along the said Big Cuyahoga river through Summit County to the point of intersection of said river with the county line between Summit and Portage counties.

That this Plaintiff corporation has the right to construct said system of dams and a line of poles whereon to string wires or cables, for the purpose of conveying electricity between its different power stations and property situate along the said river, and also all necessary power houses and stations required by it to generate electricity in, through, and upon such public and private property along its said right of way as it may require.

Plaintiff says that it is ready, and will immediately begin, the construction of its dams, pole lines, and power houses, canals, locks and raceways in and along said river between the terminal points of its right of way as hereinbefore designated.

Plaintiff says further that the said Big Cuyahoga river, between the points named herein, and between which it has the right to construct dams, power houses, and other structures for its purposes, is not navigable for boats or other craft.

Plaintiff says that it is necessary, and that it so deems it necessary, in order to carry out the objects and purposes of this corporation, that it shall appropriate, and it intends ao appropriate, as a part of its right of way for the construction, maintenance, and operation of its said system of dams, pole lines, and power houses, canals, locks and raceways, and for the purpose of constructing, maintaining, and operating thereon a dam or dams across said river which will raise the water in the channel thereof on the lands hereafter described, and also a line of poles thereon along the banks of said river, whereon to string wires or cables to convey electricity, and such power houses and other necessary structures as may be required to carry out the purposes of its charter, the following described real estate, to-wit:

Being the following described property: Situated in Summit County, Ohio, and beginning at the point in the intersection of the center of the Cuyahoga river and the north and south township line between Portage Township and Cuyahoga Falls Township; thence north 0 degrees 30′ east 100 feet; thence easterly and southeasterly along the northerly bank of said Cuyahoga river 100 feet distant from the center line of said river, following the meandering of same, to a point on the line between the property of said The Northern

Realty Company and the property of the A. B. & C. R. R. Company, said point being 100 feet distant from the center of the Cuyahoga river, measured at right angles with same; thence south 1 degree 20′ west along said line between the property of The Northern Realty Company and the property of the A. B. & C. R. R. Company; to the southwest corner of the property of the said A. B. & C. R. R. Company; thence south 88 degrees along the south line of the property of the A. B. & C. R. R. Company, said line being the dividing line between the property of the A. B. & C. R. R. Company and the property of The Northern Realty Company, to a point 100 feet distant from the center of the Cuyahoga river, measured at right angles with same; thence southeasterly and northeasterly along the northerly bank of the Cuyahoga river 100 feet distant from the center line thereof, and following the meanderings of same, to a point on a line of the land of said The Northern Realty Company, said line being an extension northerly of the east line of Tract No. 3, Portage Township, Summit County, Ohio, and also being 100 feet distant from the center of the Cuyahoga river measured at
11 right angles with same; thence northerly along said line to a stone pipe; thence northerly along the high bank of the Cuyahoga river and one rod westerly of same the following courses and distances; north 34 degrees 35′ east 264 feet; thence north 27 degrees 35′ east 286.44 feet; thence north 2 degrees 30′ west 116.16 feet; thence north 24 degrees 10′ west 138 feet; thence north 8 degrees 40′ east 107.6 feet; thence north 19 degrees 31′ east 108.24 feet; thence north 36 degrees 40′ east 168.3 feet; thence north 53 degrees 40′ east 454.7 feet; thence north 35 degrees east 280.7 feet to the northeast corner of the lot owned by Tom Patterson; thence northerly following along the westerly bank of said Cuyahoga river to the southeast corner of the property formerly belonging to The Falls Rivet & Machine Company; thence along the line between the land formerly belonging to The Falls Rivet & Machine Company and the property of The Northern Realty Company to a point on the westerly bank of said river, where said boundary line crosses said river; thence south 75 degrees east 157 feet along the line between the property formerly belonging to The Falls Rivet & Machine Company and the lands of said The Northern Realty Company to a point on the top of the bank on the easterly side of said Cuyahoga river; thence south 23 degrees west 118.80 feet along the top of said east bank; thence south 63 degrees east 52 feet to the west line of Water Street where an iron grate bar is set; thence south 22 degrees 30′ west 660 feet along the west line of Water Street to an iron pin; thence south 17 degrees 30′ west 663.34 feet along the west side of Water Street to an iron pin; thence north 63 degrees 37′ west 128.4 feet along north line of land formerly belonging to C. S. Sill to an iron pipe; thence south 31 degrees 30′ west 317.46 feet along the west line of same land to an iron pipe; thence south 41 degrees 30′ west 341.88 feet along the west line of said Sill's land to an iron pin; thence southerly and westerly along the southerly bank of said Cuyahoga river and approximately 100 feet distant from the center line of said river, following the

meanderings of same to a point on the north and south town-
12 ship line between Portage Township and Cuyahoga Falls Township; thence north 0 degrees 30′ east along said township line 100 feet to the place of beginning. Contains 40 acres more or less, with all the privileges, easements, rights, and appurtenances thereunto belonging.

Also the following described real estate, to-wit: Situated in Summit County, Ohio, and beginning at an iron pin at the southwest corner of said the A. B. & C. R. R. Company's land, said pin being on an island in the Cuyahoga river; thence north 1 degree 20′ east along said Railroad Company's west line to a point 100 feet distant from the center of the Cuyahoga river, measured at right angles with same; thence southeasterly to the south line of said Railroad Company's property at a point 100 feet distant from the center of the Cuyahoga river, measured at right angles with same; thence along the south line of said Railroad Company's land to the place of beginning. Contains 0.3 acres more or less, with all the privileges, easements, rights and appurtenances thereunto belonging, all of the above property being in the Township of Cuyahoga Falls.

The above described property is owned or claimed to be owned by the Defendant, The Northern Realty Company.

That said Plaintiff intends to construct, maintain, operate a system of dams, poles, lines, power stations, power canals, locks and raceways upon the property herein sought to be appropriated. That said Plaintiff deems it necessary to appropriate the lands of the Defendant described herein for the purposes and uses of a common carrier of water, electricity, light, heat and power, to be transported and sold to the public, and that said land is necessary for its use in carrying on its proposed business with and service to the public.

Plaintiff says that it is unable to agree with the owner of the above described real estate as to the compensation to be paid it for said property.

13 & 14 Wherefore, Plaintiff asks that such steps may be taken as are authorized by law whereby Plaintiff will be enabled to appropriate the above described real estate for its uses, objects and purposes above set forth; that it may have a decree authorizing it to so appropriate said property and for such other and further relief as, in the nature of the case, it may be entitled.

THE CUYAHOGA RIVER POWER COMPANY,
By WILLIS BACON, *Its Attorney.*

15 [Endorsed:] Doc. 4-P. 374. Case No. 4298, Probate Court. The Cuyahoga River Power Co., Plaintiff, vs. The Northern Realty Co. Defendant. Petition. Summit Co. Probate Court. O. E. Lytle, Probate Judge. Filed Jan. 20 1911, at 4:08 p. m. Willis Bacon, Attorney for Plaintiff. Feb. 3, 1911, 10 a. m. Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

16 "EXHIBIT B."

STATE OF OHIO,
Summit County, ss:

In the Probate Court.

Feb'y 3, 1911.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
vs.
THE NORTHERN REALTY COMPANY, Defendant.

Motion.

The defendant appearing solely for the purpose of this motion and not intending thereby to enter its appearance herein, moves that the Sheriff's return of service of summons be set aside for the reason that the same is not in compliance with the law.

ROGERS & ROWLEY AND
GRANT, SIEBER & MATHER,
Att'ys for The Northern Realty Co.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

17 [Endorsed:] 4-4298-374. State of Ohio, Summit County. In the Probate Court. The Cuyahoga River Power Co., Plaintiff, vs. The Northern Realty Co., Defendant. Motion. Summit Co. Probate Court. O. E. Lytle, Probate Judge. Filed Feb. 3, 1911. Grant, Sieber & Mather, Attorneys and Counsellors, Dobson Building, Akron, Ohio. Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

18 "EXHIBIT C."

In the Probate Court.

Feb'y 8, 1911.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
vs.
THE NORTHERN REALTY COMPANY, Defendant.

Motion.

And now comes the undersigned sherriff of Summit County, Ohio and moves the Court for leave to amend his return upon the summons, issued in the above entitled cause, according to the fact.

DAVID R. FERGUSSON,
Sherriff of Summit County, Ohio.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

[Endorsed:] 4-4298-374. State of Ohio, Summit County. In the Probate Court. The Cuyahoga River Power —, Plaintiff, vs. The Northern Realty Co., Defendant. Motion. Summit Co. Probate Court. O. E. Lytle, Probate Judge. Filed Feb. 8, 1911.

19 "EXHIBIT D."

In the Probate Court.

Feb. 23, 1911.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
vs.
THE NORTHERN REALTY COMPANY, Defendant.

Motion.

Now comes the defendant and moves that the court dismiss this action and strike plaintiff's petition from the files, for the reason that there is pending in this court an action or proceeding for the condemnation and appropriation of identically the same premises as plaintiff seeks to condemn and appropriate in this action, and that said action or proceeding to appropriate and condemn said premises was brought long prior to the commencement of plaintiff's action or proceeding herein and was pending in this court at the time the petition in the above entitled proceeding was filed, and that this court cannot rightfully entertain jurisdiction in this cause.

ROGERS & ROWLEY AND
GRANT, SIEBER & MATHER,
Attorneys for The Northern Realty Company.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

20 [Endorsed:] 4-4298-374. State of Ohio, Summit County. In the Probate Court. The Cuyahoga River Power Co., Plaintiff, vs. The Northern Realty Co., Defendant. Motion. Summit Co. Probate Court. O. E. Lytle, Probate Judge. Filed Feb. 23, 1911. Grant, Sieber & Mather, Attorneys and Counsellors, Dobson Building, Akron, Ohio. Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

21 "EXHIBIT E."

In the Probate Court.

May 10, 1911.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
vs.
THE NORTHERN REALTY COMPANY, Defendant.

Motion.

Defendant moves that plaintiff be required to give security for costs for the following reasons, to wit: that plaintiff was a non-resident of this county at the beginning of this action and is now a non-resident of said county.

GRANT, SIEBER & MATHER,
Attorneys for Defendant.

Filed Feb. 4, 1915. Supreme Court of Ohio, Frank E. McKean, Clerk.

22 [Endorsed:] 4-4298-374. The State of Ohio, Summit County. In the Probate Court. The Cuyahoga River Power Co., Plaintiff, vs. The Northern Realty Co., Defendant. Motion. Summit Co. Probate Court. O. E. Lytle, Probate Judge. Filed May 10, 1911. Grant, Sieber & Mather, Attorneys and Counsellors, Dobson Building, Akron, Ohio. Filed Feb. 4, 1915. Supreme Court of Ohio, Frank E. McKean, Clerk.

23 [Endorsed:] C. C. 992/16979. Probate Court, Summit County, Ohio. The Cuyahoga River Power Co., Pl'ff, vs. The Northern Realty Co., Def't. Transcript of Docket and Journal Entries. Circuit Court. Filed Sep. 28, 1911. Summit Co. C. D. Grumb, Clerk. Court of Common Pleas, Summit Co. C. D. Grumb, Clerk. Filed May 13, 1911. Willis Bacon, Tiffin, O. D. C. Westenhouse, Garfield Bldg., Cleveland, O. O. E. Lytle, Probate Judge. 13444. Filed Feb. 14, 1912. Supreme Court of Ohio. Frank E. McKean, Clerk. Filed May 15, 1914. Court of Appeals, Summit County, Ohio. Bert C. Garman, Clerk. Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

24 Court of Common Pleas of Summit County.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

Petition in Error.

(Filed May 12, 1911.)

The Plaintiff in Error, The Cuyahoga River Power Company says that by the consideration of the Probate Court of Summit County and on the 11th day of May, 1911, the said The Northern Realty Company recovered a final judgment against the said Plaintiff in Error and in favor of said Defendant in Error in an action then pending in said Probate Court, in which the said Plaintiff in Error was Plaintiff and this Defendant in Error was Defendant.

A complete transcript of all the docket and Journal Entries in said Probate Court together with all the papers and pleadings in said case are filed herewith and made a part hereof.

There is error in the record proceedings and judgment of said Probate Court affecting the substantial rights of this Plaintiff in Error, in this, to-wit:

First. The Probate Court erred in sustaining the motion of the Defendant to dismiss the Plaintiff's Petition.

Second. Said Probate Court erred in dismissing Plaintiff's Petition filed therein.

Third. Said Probate Court erred in rendering judgment against this Plaintiff in Error.

Fourth. Upon the undisputed facts in said cause the judgment of said Probate Court should have been for this Plaintiff in Error instead of for Defendant in Error.

25 Fifth. There are other errors manifest upon the face of the record.

To all of which finding judgment, proceedings and errors of said Probate Court, this Plaintiff in Error duly excepted.

Wherefore, this Plaintiff in Error prays that said judgment of said Probate Court may be reversed and set aside and that this Plaintiff in Error may be restored to all things lost by reason thereof.

D. C. WESTENHAVER,
WILLIS BACON,
Attorneys for The Cuyahoga River Power Company.

(Precipe Omitted.)

26 [Endorsed:] C. C. 992. 16,979. Common Pleas Court, Summit County, Ohio. The Cuyahoga River Power Company, Plaintiff in Error, vs. The Northern Realty Company, Defendant in Error. Petition in Error, D. C. Westenhaver, Willis Bacon, Attorneys for Plaintiff in Error. Court of Common Pleas,

Summit Co. Filed May 12, 1911. C. D. Crumb, Clerk. Circuit Court, Summit Co. Filed Sep. 28, 1911. C. D. Crumb, Clerk. Supreme Court of Ohio. 13,444. Filed Feb. 14, 1912. Frank E. McKean, Clerk. Court of Appeals, Summit County, Ohio. Filed May 15, 1914. Bert C. Garman, Clerk. Supreme Court of Ohio. Filed Feb. 4, 1915. Frank E. McKean, Clerk.

27 & 28 Common Pleas.

Supreme Court of Ohio. Filed Feb. 4, 1915. Frank E. McKean, Clerk.

May 12", 1911. Petition in error, and precipe, filed. Summons in error issued to Sheriff Fergusson.

May 13", 1911. Transcript from Probate Court, filed.

May 19", 1911. Summons in error returned endorsed "Received this writ May 13", 1911, at 4 o'clock P. M. and pursuant to its command on May 18", 1911, I personally delivered a true and certified copy of this writ to Will Christy, president of The Northern Realty Company. David R. Fergusson, Sheriff. By F. M. Jewell, Deputy.

September 18", A. D. 1911. April Term. It is ordered by the Court here that this cause be and the same hereby is continued to the next term of this Court.

September 27", A. D. 1911. September Term. Be it remembered that on the 27" day of September, A. D. 1911, being a day in the September term A. D. 1911 of this Court, the said parties appeared by their attorneys, and this cause came on to be heard upon the petition in error of the said The Cuyahoga River Power Company, plaintiff in error, herein, together with the original papers and pleadings and a duly certified transcript of the orders and judgment of the Probate Court of Summit County, Ohio, filed therewith in the said Court of Common Pleas wherein plaintiff in error was plaintiff and defendant in error was defendant, mentioned and referred to in said petition in error, and was argued by counsel: Upon consideration whereof the Court find- that there is no error manifest upon the face of the record in said orders and judgment of said Court of Common Pleas.

It is thereupon considered, ordered and adjudged by the Court that the judgment and proceedings of the said Probate Court in said cause in favor of said defendant in error and against said plaintiff in error be, and the same are hereby in all things affirmed; there being, however, in the opinion of the Court, reasonable ground for this proceeding in error.

It is further considered and ordered, that the plaintiff in error pay the costs of this proceeding in error, taxed at $— and in default thereof that execution issue therefor.

To all of which orders, judgment and decrees plaintiff in error excepted and here and now excepts. J1.60—

(Duly Certified.)

29 [Endorsed:] County of Summit, State of Ohio. No. 992. The Cuyahoga River Power Co. against The Northern Realty Co. Bacon & Westenhaven, Plaintiff's Attorneys. Rogers & Rowley, Defendant's Attorneys. Circuit Court, Summit Co. Filed Sep. 28, 1911. C. D. Crumb, Clerk. Supreme Court of Ohio. 13,444. Filed Feb. 14, 1912. Frank E. McKean, Clerk. Court of Appeals, Summit County, Ohio. Filed May 15, 1914. Bert C. Garman, Clerk. Supreme Court of Ohio. Filed Feb 4, 1915. Frank E. McKean, Clerk.

30 Circuit Court of Summit County.

Supreme Court of Ohio. Filed Feb. 4, 1915. Frank E. McKean, Clerk.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff in Error,
vs.
THE NORTHERN REALTY COMPANY, Defendant in Error.

Petition in Error.

(Filed Sept. 28, 1911.)

The Plaintiff in Error, The Cuyahoga River Power Company says that by the consideration of the Probate Court of Summit County and on the 11th day of May, 1911, the said The Northern Realty Company recovered a final judgment against the said Plaintiff in Error and in favor of said Defendant in Error in an action then pending in said Probate Court, in which the said Plaintiff in Error was Plaintiff and this Defendant in Error was Defendant.

A complete transcript of all the docket and Journal Entries in said Probate Court together with all the papers and pleadings in said case are filed herewith and made a part hereof.

The Plaintiff says further that by the consideration of The Common P-eas Court of Summit County, Ohio, and at the September term, 1911, thereof, the said The Northern Realty Company recovered a final judgment against this Plaintiff in Error, in this case wherein, this plaintiff in Error was Plaintiff in Error and Defendant in Error was Defendant in Error.

That a complete transcript of all the docket and Journal Entries in said Common Pleas Court together with all the papers and pleadings in said case are filed herewith and made a part hereof.

31 & 32 There is error in the record proceedings and judgment of said Probate Court and said Common Pleas Court affecting the substantial rights of this Plaintiff in Error, in this, to-wit:

First. The Probate Court erred in sustaining the motion of the Defendant to dismiss the Plaintiff's Petition.

Second. Said Probate Court erred in dismissing Plaintiff's Petition filed therein.

Third. Said Probate Court erred in rendering judgment against this Plaintiff in Error.

Fourth. Upon the undisputed facts in said cause the judgment of said Probate Court and said Common Pleas Court should have been for this Plaintiff in Error instead of for Defendant in Error.

Fifth. That said Common Pleas Court erred in sustaining the judgment of the said Probate Court wherein it dismissed Plaintiff's Petition and rendered final judgment against Plaintiff in Error.

Sixth. Said Common Pleas Court erred in rendering judgment against this Plaintiff in Error, and dismissing Plaintiff's Petition in Error, filed in said Common Pleas Court.

Seventh. There are other errors manifest upon the face of the record.

To all of which findings judgments proceedings and errors of said Probate Court and Court of Common Pleas, this Plaintiff in Error duly excepted.

Wherefore, this Plaintiff in Error prays that said Judgment of said Probate Court and said Common Pleas Court may be reversed and set aside and that this Plaintiff in Error may be restored to all things lost by reason thereof.

D. C. WESTENHAVER,
WILLIS BACON,
Attorneys for The Cuyahoga River Power Company.

(Precipe Omitted.)

33 [Endorsed:] 992. Circuit Court, Summit County, O. The Cuyahoga River Power Co., Pl. in Error, vs. The Northern Realty Co., Def't in Error. Petition in Error. D. C. Westenhaver, Willis Bacon, Pl'ff's Att'ys. Circuit Court, Summit Co. Filed Sep. 28, 1911. C. D. Crumb, Clerk. Supreme Court of Ohio. 13,444. Filed Feb. 14, 1912. Frank E. McKean, Clerk. Court of Appeals, Summit County, Ohio. Filed May 15, 1914. Bert C. Garman, Clerk. Supreme Court of Ohio. Filed Feb. 4, 1915. Frank E. McKean, Clerk.

34 *Mandate from the Circuit Court.*

(Sec. 239.)

In Circuit Court.

THE STATE OF OHIO,
Summit County, ss:

At a term of the Circuit Court, within and for the County of Summit, in the State of Ohio began and held before Hon. U. L. Marvin,

Hon. L. H. Winch, Hon. F. A. Henry, presiding judges at Akron, Ohio, on the 2nd day of October A. D. 1911, among other proceedings then and there had by and before said Court, as appears by its journal, were the following, viz:

No. 992.

THE CUYAHOGA RIVER POWER COMPANY
vs.
THE NORTHERN REALTY COMPANY.

This cause came on to be heard on the petition in error, the original pleadings, and a transcript of the docket and journal entries of the proceedings therein in the Probate and Common Pleas Courts, and was argued by counsel, and this Court upon consideration thereof finds that there is error in the judgment of the Common Pleas Court from which error proceedings were prosecuted to this Court in the following respect, to wit: The Common Pleas Court erred in not reversing the judgment of dismissal entered in this cause by the Probate Court and affirming the same.

It is, thereupon, adjudged and ordered by this Court that the judgment of the Court of Common Pleas be and the same is hereby reversed, annulled and set aside, and also that the judgment of the Probate Court be also reversed, annulled and set aside, and that this cause be remanded to the Common Pleas Court for further proceedings herein in conformity to the law and this judgment, and that the plaintiff recover of the defendant its costs in this proceeding expended in this Court and in the Court of Common Pleas.

Judgment is rendered for said costs. A mandate is awarded to carry this judgment into execution.

The defendant in error excepts to the finding and judgment of this Court.

35 Ordered that a special Mandate be sent to the Court of Common Pleas of said County to carry this judgment into execution.

Ordered that a copy of this entry be certified to the Clerk of the Court of Common Pleas of said County for entry, etc.

I, C. D. Crumb, Clerk of the Circuit Court of Ohio, within and for Summit County, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said Court.

Witness my hand and the seal of said Court, this 27th day of October, A. D. 1911.

C. D. CRUMB,
Clerk Circuit Court.
By —— ——, *Deputy.*

[Endorsed:] No. 992, C. C. No. —, C. P. Circuit Court of Ohio, in and for Summit County. The Cuyahoga River Power Co. vs. The Northern Realty Co. Mandate. Filed Supreme Court of Ohio, Feb. 14, 1912. Frank E. McKean, clerk. 13444. Filed Court of Appeals, Summit County, Ohio, May 15, 1914. Bert C. Garman, clerk. Filed Supreme Court of Ohio, Feb. 4, 1915. Frank E. McKean, clerk.

36 Filed Supreme Court of Ohio, Feb. 4, 1915. Frank E. Mc Kean, Clerk.

14803, No. 16979, 14803.

Docket —, Page —.

THE CUYAHOGA RIVER POWER CO.
vs.
THE NORTHERN REALTY CO. et al.

Bill of Exceptions.

Date of the Overruling or Decision May 1st, 1914.
Exceptions Filed with Clerk of Trial Court May 11, 1914.
BERT C. GARMAN, *Clerk,*
By FRED J. MILLER, *Deputy.*

(Must be within Forty days after the overruling or decision.)
Notice of Filing mailed to Rowley, Mather & Eagleson, May 11, 1914.
(By the Clerk to adverse party or his attorney, Forthwith after Filing.)

I, as adverse party to this bill of exceptions, hereby consent to immediate transmission of the same to the Trial Judge.
THE NORTHERN REALTY COMPANY,
By ROWLEY, MATHER & EAGLESON,
Its Attorneys.

Court of Common Pleas, Summit Co. Filed May 11, 1914. Bert C. Garman, clerk.
Transmitted to Trial Judge W. J. Ahern, Jr., May 20, 1914.
(Must be either 1, On Expiration of time for filing objections or amendments, or within Five Days thereafter; Or 2, Immediately of filing of the bill if the consent of the adverse party be indorsed as above indicated.)
W. J. AHERN, JR.,
Trial Judge.

Received May 20, 1914.
Corrected and Allowed this 21st day of May, 191-.
W. J. AHERN, JR.,
Trial Judge.

Transmitted back to Clerk, 5/21, 1914.
W. J. AHERN, JR.,
Trial Judge.

Received again by Clerk Bert C. Garman, May 21, 1914.

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No. 16979.

THE CUYAHOGA RIVER POWER COMPANY
vs.
THE NORTHERN REALTY COMPANY.

Index.

Plaintiff's Witnesses:

	D.	C.	Red.	Rec.		
Louis Englander	10	13	21			
W. R. Kimball	40	44	48	48	49	50
Willis Bacon	50	55	62	66		
R. F. Palmer	67	69				
Willis Bacon	none	70				

Plaintiff Rests, page 73.

Defendant's Witnesses:

Fred S. Borton	74	78	83	84
C. F. Moore	85	98	106	
Charles Currie	106	112	...	
E. D. Eckrode	115	120	...	
Charles H. Lahr	121	126	131	
W. H. Roberts	132	148	149	149
Charles H. Lahr	152	168	...	
N. O. Mother	173	177	...	

Plaintiff's exceptions, pages: 17, 20, 66, 76, 83, 85, 89, 110, 118, 119, 120, 124, 125, 133, 134, 136, 137, 138, 141, 145, 174, 175, 178.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

			Attached at page
Plaintiff's Exhibit		A	cover
"	"	B	cover
"	"	C	cover
"	"	C pg. 3	24
"	"	C pg. 5	27
"	"	C pg. 8	28
"	"	C pg. 12	29
"	"	C pg. 13	30
"	"	C pg. 14	33
"	"	C pg. 15	34
"	"	5	cover
"	"	6	cover
"	"	18	cover
"	"	18 pg. 29	31
"	"	18 pg. 14	36
"	"	18 pg. 33	39
"	"	19	cover
"	"	19–a	cover
"	"	20	cover
"	"	21	cover
"	"	22	cover

Plaintiff's Depositions of Daniel R. Bacon, et al., together with Plaintiff's Exhibits one and two thereto attached, are attached to cover.

			Attached at page
Defendant's Exhibit		A	454–456
"	"	B–1	458–461
"	"	B–2	"
"	"	B–3	"
"	"	C	402–408
"	"	D	402–408
"	"	E	409–430
"	"	F	88
"	"	G	92
"	"	H pg. 161	94
"	"	H pg. 183	95
"	"	J	cover
"	"	K	204–207
"	"	L	246–254
"	"	O	154
"	"	P	157
"	"	Q	160
"	"	R	164
"	"	S	withdrawn
"	"	T–1 to T–15	439–453
"	"	U	read in.
"	"	V	none
"	"	W	read in.
"	"	X	240–245
"	"	Y	433–437

THIS PAGE B
VERTICAL IN

BOUND BOOK

Defendant's Exhibit Deed, Millbank to Everett, 179–191.
" " Deed, Everett to N. O. Realty Co., 192–203.
" " Petition, 208–239.
" " Deed, Nor. Ohio Realty Co. to Northern Ohio Power Company, 255–267.
" " Deed, N. O. Power Co. to N. O. T. Co., 268–321.
" " Deed, N. O. T. Co. to N. O. T. & L. Co., 322–401.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

39 Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

THE STATE OF OHIO,
Summit County, ss:

In the Court of Common Pleas.

No. 16979.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
vs.
THE NORTHERN REALTY COMPANY et al., Defendant.

Transcript of Proceedings.

Appearances:

John Frank, Esq., Willis T. Bacon, Esq., and Honorable W. Z. Davis, Louis Englander, Esq., Counsel for Plaintiff.
N. O. Mather, Esq., and Roy Nesbit, Esq., Counsel for Defendant.

Be it remembered that this cause came on to be heard in the Court of Common Pleas of Summit County, State of Ohio, on this 20th day of March, A. D. 1914, being one of the days in the January A. D. 1914, Term of said Court, before the Honorable William J. Ahern, Jr., a Judge of said Court, and the following proceedings were had, towit:

Counsel for Plaintiff and Counsel for Defendant each made an opening statement of the case to the court, and counsel for defendant during said statement made the following statement—

Mr. Mather: Our defense is that this property is owned by The Northern Ohio Traction and Light Company, a public service corporation, and that the use which plaintiff seeks to make is entirely destructive of, and inconsistent with, the use for which it
40 is required, and for which it has been developed, and is now being utilized by the owner. I think that's all I care to say at this stage.

Mr. Frank: I take it that the Northern Ohio Traction and Light Company has been made a party to the case.

Mr. Mather: I left the journal entry with the Clerk, but it has not been approved. We want that journal entry approved now, either by the Court or Counsel. The calander entry is on.

Mr. Frank: I offer in evidence, the Secretary of State's certified copy of the articles of incorporation of The Big Cuyahoga Light, Heat and Power Company, marked Plaintiff's Exhibit A.

I take it, Mr. Mather, from your statement of your defense, that it is perhaps unnecessary to read these articles of incorporation.

Mr. Mather: I don't care to have them read.

Mr. Frank: It's the Secretary of State's certified copy of the articles of incorporation of The Big Cuyahoga Light Heat and Power

COPY BOUND CLOS

ompany. When I come to the amendment I may care to read
e amendment so as to get the power defined.

I offer in the same connection, Plaintiff's Exhibit B, which is the Secretary of State's certificate of the subscription to the capital stock of The Big Cuyahoga River Power Company, where it is certified the books were opened to subscribers as quired by law, and that ten percent of the capital stock has been bscribed.

Mark this Plaintiff's Exhibit Five. It is the certificate of the ecretary of State to the change of name of the Big Cuyahoga River ight and Power Company, to The Cuyahoga River Power Company. "Resolved that the articles of incorporation of this company be, and they hereby are amended by changing the name of e Company from The Big Cuyahoga Light, Heat and Power Company, to the Cuyahoga River Power Company.

Mr. Mather: We took leave to file answers in this case, but none ave been filed. The statutes seem to make no provision for it, and e courts seem to have held that it is an irregular practice. We aven't seen fit to file answers.

Mr. Frank: The original name was The Big Cuyahoga Light eat and Power Company, and the name has been changed to The uyahoga River Light Heat and Power Company.

The Court: When was that change made?

Mr. Frank: November 12, 1908.

I offer in evidence Plaintiff's Exhibit Six, the Secretary of States rtified copy of an amendment to the articles of incorporation of The Cuyahoga River Power Company, in which the purpose clause of the company is modified, and that I desire to read. This was done under date of January 12, 1912.

Mr. Mather: We object. This suit was begun January 1911.

Mr. Frank: I will read the purpose clause in the original articles incorporation, Exhibit A.

"Third. Said corporation is formed for the purpose of acquirg, erecting, building, maintaining and operating dams in the Big uyahoga River, in the State of Ohio, to raise and maintain a head water; of constructing and maintaining canals, locks and raceays to regulate and carry said head of water to any plant power house where electricity is to be generated; of erectg and maintaining a line or lines of poles whereon to atch or string wires or cables to carry and transmit electricity; of quiring, producing, manufacturing, generating and selling ectricity for light, heat, power and other purposes; of acquiring, olding and selling franchises and privileges to supply the same to unicipal corporations; of acquiring by condemnation, lease, purase or otherwise, and of possessing, holding and selling such real tate and personal property as may be necessary or convenient for e proper conduct of said business, and of doing any and all other ings necessary and incident to any of said purposes.

"Said company's improvements are to begin at the confluence of e Big Cuyahoga River and the Little Cuyahoga River below the ity of Akron, Summit County, Ohio, and extend along said Big

E IN CENTER

Cuyahoga River through the county of Summit to a point where said Big Cuyahoga River crosses the line between Summit and Portage Counties."

43 Mr. Frank: Now I desire to read the purpose clause of the amendment.

Mr. Mather: When was this amended?

Mr. Frank: January 12, 1912.

Mr. Mather: We object to that.

The Court: You don't claim that any new purpose that they might be allowed by the Secretary of State to incorporate in their charter would affect it.

Mr. Frank: It might not be to use any greater or broader purpose, but it might be the amendment would restrict the powers originally granted. The original grant of powers together with the present grant are competent to be considered in determining the present power.

Mr. Mather: Defendant objects. I would suggest this objection would not need to be resolved at this time. It may go in as far as we are concerned, subject to exception, and be determined in final argument.

The Court: That's all right.

Mr. Frank: This is the amended purpose clause.

"Said Corporation is formed for the purpose of acquiring, erecting, building, maintaining and operating a dam or series of dams in the Cuyahoga River, Big Cuyahoga River, Tuscarawas River, Mud Brook, Brandywine & Tinkers Creek and the tributaries of each of them, being situated in Cuyahoga, Medina, Summit, Portage,

44 Stark, Geauga, Tuscarawas and adjacent counties in the State of Ohio; to raise and maintain a head of water; of constructing and maintaining canals, locks and raceways to regulate and carry said head of water to any plant or power house where electricity is generated; of using said water as power in generating and producting electricity; of constructing, erecting and maintaining tubes, pipes or conduits through which electricity may be carried and transmitted, and a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity; of acquiring, producing, manufacturing, generating, transmitting and selling electricity for light, heat, power and other purposes; of supplying and selling electricity to municipalities and other public agencies; of acquiring, holding and selling franchises and privileges to supply the same to municipal corporations; of acquiring by condemnation, lease, purchase or otherwise, and of possessing, holding and selling such real estate and personal property as may be necessary or convenient for the proper conduct of said business, and of doing any and all other things necessary and incident to any of said purposes. The improvement said Company will consutruct not to be located at a single place, will be for the purpose of transmitting and condu-ting electricity and will have it seastern terminus at or near the Village of Burton Station in Geauga County; its western terminus at or near the confluence of Tinkers Creek and the Cuyahoga River in Cuyahoga County, and

its southern terminus at or near Canal Dover in Tuscarawas County, and with its main line and branches will pass in or through the Counties of Cuyahoga, Summit, Medina, Portage, ark, Geauga and Tuscarawas, in said State."

Mr. Mather: What is the date of that changed purpose clause?
Mr. Frank: January 12, 1912.

Thereupon the Plaintiff, for the purpose of further maintaining the issues upon its part to be maintained, offered as a itness LOUIS ENGLANDER, who being duly sworn according to law, stified as follows:

Direct examination.

(By Mr. Frank:)

Q. Mr. Englander, your first name?
A. Louis Englander.
Q. Where do you reside?
A. Cleveland, Ohio.
Q. What is your business?
A. Attorney at Law.
Q. Are you connected in any way with The Cuyahoga River Power ompany?
A. I am now secretary and treasurer of that company.
Q. How long have you been secretary and treasurer of the company?
A. I have been treasurer ever since its organization. I don't recall ow many years I have been secretary.
Q. Continuously since the organization of the company?
A. Yes, sir.
Q. And were you such secretary on the 28th day of September, 1911, assuming that the company was then in existence?
A. I don't recall that I was secretary—I think I was—Yes, ever nce that time.
Q. I hand you—and as secretary of the company, what have you ad to do with the corporate records of the company?
A. I have charge of them.
Q. Have you made and kept the corporate records?
A. Yes, sir.
Q. I hand you a volume, which is marked, Plaintiff's Exhibit C, nd another volume, marked Plaintiff's Exhibit Eighteen, and ask ou to state whether or not those are the corporate records of the ompany?
A. They are.
Q. State whether or not the proceedings as recorded in those volmes are, or are not the proceedings of the incorporators and direcrs and stockholders of the company?

Mr. Mather: I object. There is nothing to show whether he transribed the records and knows.

The Court: Did you transcribe those Mr. Englander?

A. I see that I was mistaken. From the beginning I was not secretary of this company, from the beginning, of the company.

Mr. Frank:

Q. From what time, or when did you become secretary?

A. The records will show that better than my memory. I
48 was Secretary of the Cuyahoga River Power Company, but not of The Big Cuyahoga Light Heat and Power Company. I was elected secretary of the company, November 28th, 1908.

Q. November 28, 1908?

A. Yes, sir.

Q. And since then have you been secretary and treasurer continuously?

A. Yes, sir.

Q. At the time of becoming secretary of the company did that corporation record book come into your possession?

A. It did. I might further state it was practically in my possession at all times from the organization of the company because Mr. Dempsy and I were in the same office together, and we both prepared those records together, although they bore the signature of Mr. Dempsy, at the time he was secretary.

Q. Are you able to state whether or not the records contained in those volumes are the proceedings of the Cuyahoga River Power Company, and The Big Cuyahoga River Light Heat and Power Company?

A. I am.

Q. That is all—one more question——

A. They are the records.

Q. You were treasurer of the company from the beginning?

A. Yes, sir, from the beginning.

Q. Are you able to state whether or not in the organization
49 of that company, and prior to the election of a board of directors, any money was paid on account of subscriptions to capital stock?

A. Ten per cent was paid at the time of organization.

Cross-examination.

By Mr. Mather:

Q. Who paid the ten per cent you speak of?

A. It was paid to me by Mr. Siddle, a representative of the incorporators.

Mr. Mather: I object to the answer and ask that it be excluded.

The Court: Who paid it?

A. It was paid to me by Mr. Siddle, a representative of the incorporators.

Mr. Mather: You mean by that, Mr. Siddle paid it to you?

A. Handed certain check over to me.

Q. What checks?
A. One check was made to the order of Willis Bacon, and another check made to the order—I can't remember it that way, but it was made in such a way that I deposited it in the bank, endorsed by Mr. Siddle.
Q. Have you got the bank book?
A. That's in the records somewhere.
Q. Have you made a search for it?
A. I did, but I thought that went into the record. I have
50 a memoranda here that shows just how it was deposited.
Q. How much was paid you?
A. One Hundred Dollars.
Q. Have you been treasurer since then?
A. Yes, sir.
Q. Has any other money been paid to you than the one hundred dollars?

Objected to.
Mr. Mather: I want to show whether this company was organized in good faith.
Objection sustained.
Mr. Mather: Note an exception.

Q. One Hundred Dollars was paid to you in checks; how soon after they were handed to you did you deposit those checks?
A. I deposited one check on the fifth of June, 1908.

Mr. Frank: I object to that.
Mr. Mather: We want to know whether the certificate was properly filed.
The Court: I think they have a right to know whether the certificate was properly filed. It may stand.

Mr. Mather:

Q. Fifth of June 1908; what about the rest of them?
A. The other check a day or two after that.
Q. Do you remember the date?
A. My check book shows the 8th or 9th.
51 Q. Have you got your check book here?
A. The stub check book?
Q. Just what does it show?
A. The deposit on the 9th.
Q. How much did you deposit on the 9th?
A. $50.00.
Q. How much did you deposit on the 5th?
A. $50.00.
Q. That made the amount $100?
A. Yes, sir.
Q. And when did you file the certificate with the Secretary of State?

Mr. Frank: That shows for itself. The record is right there.

A. I presume it was the date of organization, I think, June 3rd.

Mr. Mather: Your certificate filed with the Secretary of State shows you filed it on the 4th day of June, 1908, so at the time you filed this certificate——

A. It was certified on the third. It was mailed from our office the date it was organized, the third.

Q. So at the time you had filed this certificate you had received no cash?

A. I had received $100.00.

Q. In checks?

A. Yes, sir.

Q. Did you say you received these checks on the third day of June?

52 A. I did.

Q. And you then certified to the Secretary of State ten per cent of the capital stock had been subscribed for, and more than ten per cent had been paid?

A. That ten per cent of the ten per cent subscribed for had been paid.

Q. What was the capital stock?

A. $10.000.00.

Q. And it never has been increased?

A. No.

Q. Were you then in the office of Henderson, Quail & Siddle?

A. Yes, sir.

Q. Mr. Englander, you were a subscriber for one share of the capital stock of this company were you not?

A. I was.

Q. Did you pay for your share?

A. It was paid for.

Q. You didn't pay for it yourself?

A. In a way I did.

Q. Are you a director in this company?

A. I am.

Q. Have you ever paid anything on your share of stock?

A. It's been paid for, yes.

Q. That isn't the question.

Objected to.

The Court: I don't think that makes any difference.

53 Mr. Mather: He has no right to serve as a director of this company with a share of stock paid for by somebody else.

Mr. Frank: If ten per cent was paid he has a right to serve.

Mr. Mather: The Statutes of the State require a director to be a bona fide stockholder.

Mr. Mather:

Q. Who paid in the One Hundred Dollars that was paid to you as treasurer of this concern?

Objected to; objection overruled; plaintiff excepts.

A. Well, I said I couldn't say without the records.

Q. Does the record show?
A. The record shows from whom I received the money.
Q. Just open it and see?
A. As I stated before I think that Mr. Siddle received the payments and he turned them over to me.
Q. How do you know he received them? Are you testifying from your own knowledge?
A. Well, the records show that Mr. Siddle, as chairman of the incorporators was authorized to receive all subscriptions to the capital stock, and transfer the same to the treasurer of the company, and it was from him that I received the ten per cent.
Q. Then your idea is that if this resolution authorized Mr. Siddle to receive ten per cent, that he did receive it?
A. No, I said that that resolution refreshes my recollection.
Q. Do you now say that Mr. Siddle did receive the ten per cent from the stockholders?
54 A. I don't say that he received it from every subscriber.
Q. Isn't the most you know, that Mr. Siddle gave you $100 and you deposited it in the bank to the credit of this company?
A. I know he received it.
Q. How do you know it?
A. He told me.

Mr. Mather: I ask that the answer be excluded.
The Court: It may stand.

Mr. Mather:

Q. Mr. Siddle told you he had received it?
A. The fact of the matter is I saw him receive it also.
Q. From whom?
A. I don't remember from whom I saw him get the checks.
Q. From whom?
A. Mr. Kimball was one.
Q. Did you see the checks?
A. I certainly did.
Q. Did you afterwards receive those same checks?
A. I did.
Q. Then Mr. Siddle didn't pay you his individual check for $100?
A. No, sir.
Q. He turned over the same checks he received?
A. Yes, sir.
Q. Have you any record of those checks?
A. I just told you.
55 Q. Would you have those canceled checks?
A. How would I have canceled checks drawn by somebody else? How would I have a canceled check drawn to my order?
Q. Did you afterwards check out this money that was paid in the bank?
A. I did.
Q. Who wrote the checks?
A. That's not the question you asked me.

Q. Who wrote the checks? Who checked out this hundred dollars?

A. I did.

Mr. Davis: I object. The material question is what the statute requires. The statute requires the payment of ten per cent and that was certified to have been made. It isn't a matter of any import as to who paid it.

Mr. Mather: I agree with the Judge that the certificate of the Secretary of State is prima facie evidence that the subscription has been paid, but if it can be shown by proper evidence that the ten per cent of the capital stock subscribed for has not been paid for, then the company is not lawfully organized, and cannot appropriate property. Now the testimony of this witness is to the effect first, that he received two fifty dollar checks, and deposited them, and his check books show it, and now he would have the court believe that the individual stockholders paid in ten dollar checks to Siddle, and Siddle turned them over to him. He has already made contradictory statements.

The Court: It seems to the court, if it appears the ten
56 per cent has been paid, and the certificate of such payment has been returned by the Secretary of State, and the records of the company show it has been paid, that that evidence is practically conclusive. Don't the records show?

Mr. Mather: No. There is not a word in the record about it. What we want to find out is whether the one hundred dollars was actually paid, or not? We haven't found out yet.

The Court: You may answer the question.

Plaintiff excepts.

A. I haven't tried to say that any incorporator paid a certain amount. I already stated the one hundred dollars was paid and deposited by me.

Mr. Mather:

Q. What I am trying to find out is who paid the one hundred dollars: can you tell me in plain English? Who paid that hundred dollars?

Objected to; objection overruled; plaintiff excepts.

A. I told you that I received two checks for one hundred dollars.

Q. You mean two checks for fifty dollars each?

A. Yes, and those were deposited.

Q. Will you kindly tell who gave you those checks?

A. One check was signed and endorsed by Mr. Bacon, and one check was given by Mr. Kimball.

Q. And each was fifty dollars?

A. Yes, sir.

Q. And that is the hundred dollars that you deposited to
57 the credit of the Big Cuyahoga Light, Heat & Power Company?

A. Yes.

Q. As its treasurer. That's the only money you received at that time?

A. At that time.

Q. And upon that you made your certificate to the Secretary of State, or the incorporators did?

A. Yes.

Q. By Mr. Bacon, you mean Willis Bacon?

A. Yes.

Q. Was he one of the incorporators of the company—no, his name doesn't appear.

A. I think it does appear as one of the subscribers of stock.

Mr. Mather: That's all.

Redirect examination by Mr. Frank:

Q. One question—a few questions that I omitted. I call your attention to page five of exhibit C, subscriptions to the capital stock of the company, and ask you whether you were present when the subscriptions were made?

A. I was.

Exhibit C is hereto attached, marked Plaintiff's Exhibit C and made a part hereof.

Q. I call your attention to the first signature, "June 3,
58 Willis Bacon by W. R. Kimball 5" shares. Did you see that subscription made?

A. I did.

Q. Was that writing done by Mr. W. R. Kimball?

A. It was.

Q. I call your attention to the next signature purporting to be that of Milton C. Canfield, one share; did you see Mr. Canfield write his name there?

A. I did.

Q. And the next, Mortimer A. Munn, one share, did you see Mr. Munn sign his name?

A. Yes, sir.

Q. And the next Mr. Siddall, one share, did you see Mr. Siddall sign that?

A. I did.

Q. And the next, Louis Englander, one share, did you see Mr. Englander sign that?

A. I did.

Q. And Mr. John P. Dempsy, one share, did you see Mr. Dempsy sign that?

A. I did.

Mr. Frank: That's all.

Mr. Mather: That's all.

59 Mr. Frank: I offer now from Exhibit C, at page three the order of the incorporators for opening the books to subscribers, and their waiver of notice of publication. Page Three of Exhibit C. "Order and waiver of notice. We, the undersigned, being all.

Mr. Mather: Can we agree these exhibits may all be copied into the record?

Mr. Frank: Sure.

Mr. Mather: All exhibits that it is possible to make copies of shall be copied into the record when the record is made, in lieu of the originals.

True Copy of Page 3 Exhibit C is hereto attached marked Page Three, Plaintiff's Exhibit C, and made a part hereof.

60 TRUE COPY OF PAGE THREE, PLAINTIFF'S EXHIBIT C.

"Office of Henderson, Quail & Siddall, 1015 Garfield Building, Cleveland, Ohio.

June 3, 1908.—2.45 o'clock p. m.

Order and Waiver of Notice.

We, the undersigned, being all of the subscribers to the Articles of Incorporation of The Big Cuyahoga Light, Heat & Power Company, do hereby order that books be opened for subscriptions to the capital stock of said Company at the above named place on the 3rd day of June, 1908, at 2.45 o'clock P. M., and we do hereby waive notice by publication of the time and place so fixed for the opening of such books, as otherwise required by law.

MILTON C. CANFIELD,
MORTIMER A. MUNN,
G. B. SIDDALL,
LOUIS ENGLANDER,
JOHN P. DEMPSEY,
Incorporators.

"There was convened at the above named time and place a meeting of the incorporators of The Big Cuyahoga Light, Heat & Power Company, they having first executed the foregoing order and waiver of notice.

"Thereupon, pursuant to such order and in the presence of
61 all of said incorporators, who selected G. B. Siddall as their Chairman and authorized him, on their behalf, to receive all subscriptions to such capital stock and to transfer the same to the Treasurer of the Company when the same should be duly organized, books of subscription were duly opened, and ten per cent of the authorized capital stock of said company having been duly subscribed, said incorporators then, in the presence of such subscribers to such stock as aforesaid, desiring to certify that fact to the Secretary of State in accordance with the provisions of Section 3244 of the Revised Statutes of the State of Ohio, made, executed and deposited in the post office of the City of Cleveland, properly stamped and addressed to the Secretary of State at Columbus, Ohio, a certificate, of which the following is a copy:"

" 'The Big Cuyahoga Light, Heat & Power Company.

Certificate of Subscription.

CLEVELAND, OHIO, June 3, 1908.

To the Secretary of State, Columbus, Ohio:

We, the undersigned incorporators of The Big Cuyahoga Light, Heat and Power Company, do hereby certify that on the third day of June, 1908, all the incorporators of said Company did order, in writing, that books be opened for subscription to the capital stock of said Company, at the offices of Hessrs. Henderson, Quail and Siddall, 1015 Garfield Building, Cleveland, Ohio, on the third day of June, 1908, at 2.45 o'clock P. M., and, at the same time, did waive, in writing, the notice by publication of the time and
62 place of such opening of books of subscription, required by law; and further, said books having been opened at the time and place ordered, that ten per cent, of the capital stock of said company has been subscribed.

MILTON C. CANFIELD,
MORTIMER A. MUNN,
G. B. SIDDALL,
LOUIS ENGLANDER,
JOHN P. DEMPSEY,
Incorporators.' "

(Page Three, Plaintiff's Exhibit C.)

63 Mr. Frank: I offer next the subscriptions to the capital stock, on Page Five Exhibit C.

(A true copy of said page five Exhibit C, is made a part hereof, marked page five exhibit c, and is hereto attached, as follows, towit:)

PAGE FIVE EXHIBIT C.

"Subscriptions to the Capital Stock of The Big Cuyahoga Light, Heat & Power Company.

Date.	Name of Subscriber.	Number of shares.
1908.		
June 3.	Willis Bacon by W. R. Kimball	Five (5)
	Milton C. Canfield	One (1)
	Mortimer A. Munn	One (1)
	S. B. Siddall	One (1)
	Louis Englander	One (1)
	John P. Dempsey	One (1)

64 Mr. Frank: I offer the record of the first stockholder's meeting, on page eight, nine, ten and eleven, exhibit c, and page 12. There is some matter in there that is irrelevant. I will offer page eight, down to the words 'Code of Regulations.'

(Copy of said Exhibit Page Eight, Exhibit C, is hereto annexed, made a part hereof, and marked Page Eight, Exhibit C, and is as follows:)

EXHIBIT PAGE EIGHT EXHIBIT C.

"Office of Henderson, Quail & Siddall, 1015 Garfield Building, Cleveland, Ohio.

June 3, 1908.—3 o'clock p. m.

First Stockholders' Meeting.

All of the subscribers to the capital stock of The Big Cuyahoga Light, Heat & Power Company being present at the time and place above named, and ten per cent. of the authorized capital stock of said Company having been duly subscribed, and such fact having been duly certified to the Secretary of State by the incorporators, the said subscribers, having first executed the foregoing waiver of notice and consent, organized by choosing G. B. Siddall as Chairman and John P. Dempsey as Secretary of the meeting.

Upon motion duly made and seconded, the following Code of Regulations for the Company was duly adopted by the unanimous vote of all of the stockholders:

Code of Regulations."

65 Mr. Frank: And then again, what is found on page 12.

(True copy of said exhibit is hereto attached, marked page 12 Exhibit C, and made a part hereof, as follows:)

PLAINTIFF'S PAGE 12 EXHIBIT C.

"The stockholders then proceeded to the election of five directors, and such election having been had by written ballot under the supervision of the incorporators, the following named persons were elected as such directors, there having been voted for each, the entire 10 shares of the capital stock of the company already subscribed for: Milton C. Canfield, Mortimer A. Munn, G. B. Siddall, Louis Englander and John P. Dempsey.

"There being no further business, the meeting, on motion, adjourned.

G. B. SIDDALL, *Chairman.*

JOHN P. DEMPSEY, *Secretary.*

Mr. Mather: We object.
The Court: It may go in.
Defendant excepts.

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Mr. Frank: I offer the incorporator's certificate on page 13.

True Copy of Said Exhibit is hereto attached, marked Page 13, ntiff's Exhibit C, and made a part hereof, as follows:)

PAGE 13, PLAINTIFF'S EXHIBIT C.

"Incorporators' Certificate.

Ve, the undersigned, incorporators, of The Big Cuyahoga Light, t & Power Company, hereby certify that, being inspectors of the ion held as above recited, Milton C. Canfield, Mortimer A. Munn, 3. Siddall, Louis Englander and John P. Dempsey were duly ed as directors of said Company, and we hereby fix and desig- the place at which such election was held and the hour of 3.15 ck P. M. on the 3rd day of June, 1908, as the time and place for ing the first meeting of the board of directors of the Company.

MILTON C. CANFIELD.
MORTIMER A. MUNN.
G. B. SIDDALL.
LOUIS ENGLANDER.
JOHN P. DEMPSEY.

Ir. Mather: We object to that also.
he Court: It may be admitted.

efendant excepts.

Mr. Frank: I offer from Exhibit 18, which is volume two of the corporate records, page 29, the record of the last election he board of directors prior to the commencement of this proceed- under date of July 12, 1910.

True copy of said exhibit is hereto attached, marked page 29 ntiff's exhibit 18, and made a part hereof, as follows:

PAGE 29, PLAINTIFF'S EXHIBIT 18.

"Annual Meeting of Stockholders.

Office of Englander & Allison,

Guardian Bldg., Cleveland, Ohio.

July 12, 1910—2 o'clock p. m.

ll the owners and holders of the capital stock of The Cuyahoga er Power Company being present at the time and place above ned, either in person or by proxy:
V. R. Kimball, owning 91 shares,

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Willis Bacon, owning 1 share,
John A. Nally, owning 1 share,
Louis Englander, owning 1 share,
John L. Wells, Trustee, owning 5 shares,
John L. Wells, owning 1 share.

The names of John L. Wells, W. R. Kimball, Louis Englander, John A. Nally and Willis Bacon, were presented for election to the Directorate of said corporation, and upon motion, duly seconded and unanimously carried, the entire one hundred votes present were cast for each candidate and the same were delcared elected Directors of said corporation.

There being no further business before said stockholders'
68 meeting, the same was adjourned.

LOUIS ENGLANDER, *Secretary.*

Mr. Mather: Is that offered for the purpose of showing a board of directors were elected?

Mr. Frank: That's all.

Mr. Mather: And not to show who was the owner of the capital stock?

Mr. Frank: Yes.

Mr. Mather: We object to that exhibit.

The Court: It may go in.

Defendant excepts.

Mr. Frank: I offer from Exhibit C, page 14, first directors' meeting, June 3, 1908, 3.15 P. M.

(True Copy of said exhibit is hereto attached, marked Plaintiff's Exhibit C, Page 14, and made a part hereof, as follows:)

69 PLAINTIFF'S EXHIBIT C, PAGE 14.

"Office of Henderson, Quail & Siddall, 1015 Garfield Building,

CLEVELAND, OHIO, June 3, 1908.

3.15 o'clock P. M.

First Directors' Meeting.

Pursuant to the designation of the incorporators, there was this day convened a meeting of the directors of The Big Cuyahoga Light, Heat & Power Company at the time and place above named, at which all of said directors were present, each director having first qualified by taking the oath of office before R. J. Bulkley, a Notary Public in and for Cuyahoga County, Ohio.

G. B. Siddall was chosen Chairman and John P. Dempsey Secretary of the meeting.

The directors then proceeded to the election of officers for the suing year. The following officers were unanimously elected:
President, G. B. Siddall.
Secretary, John P. Dempsey.
Treasurer, Louis Englander.
The matter of constructing an electric power plant at or near yahoga Falls was discussed and plans, reports and surveys of ie Roberts and Abbott Company for such a plant were laid before e directors.
On motion of Mr. Munn, duly seconded, the following resolution s unanimously adopted:
'Resolved, That Mr. Willis Bacon be, and he hereby is, employed the company to conduct negotiations for the purchase of the property and rights necessary for the construction of such a plant as is contemplated by the plans, surveys and preliminary reports of The Roberts and Abbott Company, as presented by Mr. Munn, the assistant chief engineer of said company.'
On motion duly seconded, the meeting adjourned, to meet at the me place on June 4, 1908, at 4 o'clock P. M.

JOHN P. DEMPSEY, *Secretary.*

Mr. Mather: We object to that. This record has not been identified.
Mr. Frank: Why hasn't it been identified?
Mr. Mather: There is no secretary present to show it was adopted, show anything of the sort. There hasn't been anybody testify out this resolution.
The Court: He said he was present and helped make them up. hat they made them up together, he and Dempsey. I remember at distinctly. It may go in.
Defendant excepts.
Mr. Frank: I offer from Page 15, of the same exhibit, C, the llowing:
"Thereupon Mr. Dempsey presented the following resolution and oved it's adoption:
QWhereas, This company has attempted to purchase various ieces of real estate and property hereinafter described, and has ade offers of purchase prices and compensation to the several owners and claimants of said property, respectively, but has been unable to agree with said owners and claimants as to the amount to be paid for said real estate and property;
"And, Whereas, It is necessary and essential, in order to carry ut the purposes of its organization, that this company acquire said arious pieces of real estate and property and for the purpose of acquiring, erecting, building, maintaining and operating a system f dams in the Big Cuyahoga River in the State of Ohio; of raising nd maintaining a head of water; of constructing and maintaining anals, locks and raceways; of regulating and carrying said head f water to its plants or power houses where electricity is to be enerated; of erecting and maintaining a line or lines of poles hereon to attach or string wires or cables to carry and transmit

electricity; of acquiring, producing, manufacturing, generating and selling electricity for light, heat, power, and other purposes, of acquiring, holding and selling franchises and privileges and supplying the same to municipal corporations; of acquiring by lease, purchase or otherwise, and possession, holding and selling such real estate and personal property as may be necessary for the proper conduct of said business, and to do any and all other things necessary and incident to any of its said purposes;

"Now, Therefore, Be It Resolved, That it is necessary and essential, for the purposes aforesaid, to appropriate and condemn, and this company does hereby appropriate and condemn, each and all of the following described real property and estate for the uses and purposes aforesaid:"

72 Mr. Frank: Then follows a long description.

Mr. Mather: That's the same property you have described in the petition in the suit begun soon after that, and also in this suit? What is the date of that?

Mr. Frank: June 4th, 1908.

The Court: What was the date of that other resolution?

Mr. Frank: June 3, 1908.

Mr. Frank: I offer Exhibit 18, page 14, under date of April 23, 1909.

"Special Meeting of Directors. There was convened at the above named time and place a Special Meeting of the Directors of the company, pursuant to the call of the President therefor.

"Present: W. R. Kimball, Willis Bacon, John A. Nally and Louis Englander, being a majority of the Directors of the Company.

"The meeting was called to order by the President.

"On motion of Mr. Bacon, duly seconded, it was resolved that the President and Secretary be authorized to issue to W. R. Kimball, or to whomsoever he may direct,—"

Mr. Frank: I don't care for that.

"Director Englander moved the adoption of the following resolution:

"Whereas, at a meeting duly called, the Directors of this Company, did, on the 3rd day of June, 1908, consider, approve, and adopt, the plans, reports and surveys, for the proposed plant

73 of this company, as presented at said meeting by Mortimer A. Munn, which report, plans and surveys, are hereby referred to and made a part hereof, and,

"Whereas, said report specifies on pages 1 and 2, concerning the "General Scheme," as follows:

"There are two proposed power house sites which will hereafter be designated as the 'Lower Power' and the 'Upper Power.' The 'Lower Power' is designated on the map as being located on the Big Branch of the Cuyahoga River, a short distance west of the corporate limits of the Village of Cuyahoga Falls, Ohio. From the site of the 'Lower Power' to the point marked 'Dam,' there is a difference in elevation from the level of the water in the river at the Power House to the bottom of an old raceway, known as the 'Chuckery Race' at the proposed dam site, of 166 feet.

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The proposed Dam is to be 70 feet in height and it is to flood and place 5 existing dams located in the Village of Cuyahoga Falls, upper one of which is located near the business center of the n. At this upper dam the water is backed up in the river to nroe Falls, where an existing paper mill utilizes approximately feet of fall in the river. The paper mill dam at Monroe Falls ks the water up the river to the proposed 'Upper Power' at Kent, ere there is now a 20 foot head of water. From the Upper ver at Kent the water backs up the river to where it is crossed by Cleveland and Pittsburg division of the Pennsylvania Railway.

The General Scheme is to conduct such flow of the Cuyahoga River as will be used by the Lower Power from the proposed 70 foot dam, by a canal, which is marked in red on the attached map. The 'lower' and 'upper powers' will be conted by a transmission line, and,

'Whereas, as stated in said Report and as shown by the line in upon said topographical map, the construction of the proposed n of 70 feet in height would flood the upper dams in Cuyahoga lls, raising the water to elevation 1000 feet, or approximately to eastern line of the village of Cuyahoga Falls, and would also ert water from all the property below said dam down to the ation of the 'Lower Power House,' and said section of the river ich is either so flooded or from which the water is so diverted, is section specified in the charter of this Company, and covered by said surveys of Mortimer A. Munn;

'Now, therefore, be it resolved, that the action of said meeting of ne 3rd, 1908, in considering and adopting the said Report, Plans d Surveys of The Roberts-Abbott Co. is hereby ratified and apved, and said plans, Report and Surveys, are hereby re-approved d re-adopted.

"The motion was declared carried."

Mr. Mather: We object to the offer.

The Court: It may go in.

Defendant excepts.

Mr. Frank: From the same Exhibit, number 18, at page 33, Special Meeting of the Directors, held on January 14, 11, at two o'clock P. M.

"On motion of Lewis Englander, duly seconded, the following olution was unani-ously adopted. 'Resolved that Willis Bacon and he hereby is employed by the Company and duly and legally thorized to conduct negotiations for and to contract for the purase of and to purchase the property and rights necessary for the nstruction of the work or works necessary for a water power plant ntemplated by the plans, surveys and reports of The Roberts & bott Company, as presented by Mr. Munn, the Assistant Chief gineer of said Company and of other associate and consulting gineers heretofore employed to report upon said water power plant d project.

"It is further resolved that to carry out the purposes of its organtion and the projects contemplated in said reports, that the follow- parcels of land are necessary:

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"Situate in Summit County Ohio, and beginning at the point o the intersection of the center of the Cuyahoga river and the north and south township line between Portage Township and Cuyahoga Falls Township,—" and so forth. That's the property described in our petition.

Mr. Mather: We object to that offer.
The Court: Was that before or after the suit?
Mr. Frank: Before.
The Court: It may be admitted.
Mr. Mather: It was the same day.
Except.

76 Thereupon the Plaintiff, for the purpose of further maintaining the issues upon its part to be maintained, offered as a witness WILLARD R. KIMBALL, who being first duly sworn according to law, testified as follows:

Direct examination.

By Mr. Frank:

Q. Mr. Kimball, what is your connection with The Cuyahoga River Power Company?
A. I am now President of the company.
Q. How long have you been president?
A. About four years.
Q. How long have you been connected with the company?
A. I have been interested in the company since its incorporation.

Mr. Nesbit: I ask to have the answer excluded.
The Court: It may stand.
Defendant excepts.

Mr. Frank:

Q. What if any relation had you with the company prior to your becoming president?
A. I was a stockholder in the company and represented financial interests which were in the company.

Mr. Mather: I ask to have the answer excluded.
Mr. Nexbit: I ask to have the answer excluded.
The Court: The last part may be excluded.

Mr. Frank:

Q. I call your attention to exhibit nineteen, marked on the cover, The Roberts & Abbott Co., and ask you to state what that
77 exhibit is?

Objected to—objection overruled—defendant excepts.

A. The first part of the exhibit is a letter from the Roberts & Abbott Company, dated April 29, 1908.

Mr. Mather: I ask that the answer be excluded.
The Court: I suppose that speaks for itself, what it is.

Mr. Frank:

Q. What is the exhibit as a whole?
A. It is the report, surveys and map, referred to in the resolution of the company, which has been read, of April 23, I think, 1909.

Mr. Mather: I object to that. This exhibit will have to speak for itself.
The Court: I think so. The exhibit speaks for itself.
Mr. Frank: That part is competent in which he says it is a report.
The Court: Yes, it's a report.

Mr. Frank:

Q. Is it the original report or a copy?
A. It's the original.

(Said Exhibit is hereto attached, Marked: Plaintiff's Exhibit 19, and made a part hereof.)

Q. State whether or not you had this report before the Board of Directors—were you present at the meeting of the board of directors?
A. I was.
Q. Of April 1st, 1909?
A. First?
Q. April 23rd?
A. I was.
78 Q. And was this report before the board of directors at that time?
A. It was.
Q. State whether or not this is the document referred to in your record as the plans of the Roberts & Abbott Company?

Objected to.
A. It is.

The Court: I think you may answer the question.
Mr. Mather: Note an exception.

Mr. Frank:

Q. State whether or not this document, exhibit 19, is the report, —is or is not the report called in the record books, the Roberts Abbott report?
A. It is the report of the Roberts & Abbot Company.
Q. I show you now Plaintiff's Exhibit 20, and ask you what that document is?
A. It is the report of H. A. vom Schon together with the maps accompanying the report referred to in the resolution of April 23, 1909.

(Said Exhibit is hereto attached marked: Plaintiff's Exhibit 20, and made a part hereof.)

Q. Was that report before the board of directors, April 23, 1909
A. It was.
Q. State whether or not that is the same report referred to in you record as the von Schon report?
A. It is.

Q. I now show you Plaintiff's Exhibit 21, and ask yo
79 what that is?

A. It is a printed copy of the von Schon report, exclusive o the tables regarding precipitation contained in the original repor

(Said exhibit is hereto attached, marked: Plaintiff's Exhibit 2 and made a part hereof.)

Q. I will ask you whether or not that is the printed copy referre to in your record on page 16, under date of April 23, 1909, whe this language is used: "Also that the development program of th company be hereby fixed and determined as the same is set forth i said Report of H. A. von Schon upon pages 25 to 27 inclusive, o the original copy, (pages 21 and 22 of the printed copy) as fo lows, to-wit"?
A. It is.
Q. In connection with exhibit 19 I direct your attention to th loose map bound on cloth, and ask you to state whether or not th map was before the board of directors at the meeting of April 2 '09?
A. It was.
Q. And was it referred to in your records of maps of that meeting
A. April 23, 1909? Yes.

Mr. Frank: Mark this map Plaintiff's Exhibit 19 A.

(Said exhibit is hereto attached, marked: Plaintiff's Exhib 19-A, and made a part hereof.)

Mr. Frank:

Q. I have marked the map in question, plaintiff's exhibit 19 and just ask you again if that is the map you had before you o April 23, 1909?
80 A. That is the map.

Cross-examination.

By Mr. Mather:

Q. How long have you been president of the Cuyahoga Rive Power Company?
A. I think about four years.
Q. Has the Cuyahoga River Power Company any property ou side of these reports?
A. It owns the equitable title to the Cuyahoga river, to the entir Cuyahoga river.
Q. You haven't any proof of that outside of your own statement
A. We get it from the authorities.

Q. Do you own any legal title along the Cuyahoga River?
A. No.
Q. Have you any contracts with any municipalities for supplying electricity?
A. No.
Q. Have you any contracts with private concerns?
A. No, sir.
Q. Have you ever developed any power along the Cuyahoga River?
A. We did not.
Q. You built no power houses, either steam or hydro-electric?
81 A. No, sir.
Q. You built no dams?
A. No.
Q. No reservoirs?
A. No.
Q. And have done absolutely nothing except consult with engineers?
A. No, sir, we began the construction of our property by beginning condemnation proceedings.
Q. In 1908 you began a suit to appropriate the same property as you seek to appropriate in this suit?
A. Yes, sir.
Q. And you abandoned that suit so far as this particular piece of property is concerned?
A. We did.
Q. You never heard the preliminary questions involved in that suit against this defendant?
A. No, we never did. Do you want to know why?
Q. I don't care why. Your resolution authorizing Mr. Bacon to negotiate for this property was passed on the 14th day of January, 1911, wasn't it?
A. Yes.
Q. And that was passed in Cleveland, wasn't it?
A. Yes, sir.
Q. And six days after that you began this suit, didn't you?
A. Yes.
Q. Of course you had nothing to do with the *the* negotia-
82 tions for the property?
A. Oh, yes.
Q. Did you prepare the offer which was submitted by Mr. Bacon, if one was submitted?
A. I participated in the preparation.
Q. You knew this property was owned by the Northern Ohio Traction & Light Company, didn't you?
A. No, sir, I did not.
Q. Didn't you know they had an interest in it?
A. No, sir, I don't think I did.
Q. You were connected with the company in 1908 were you not?
A. I was.
Q. And was present at the meeting of the Board of Directors?

A. Yes, sir.
Q. When this resolution was passed?
A. Yes, sir.
Q. Mr. Kimball, you were present at the meeting of the Board of Directors on June 4, 1908?
A. Yes, sir.
Q. And voted for the resolution which was passed at that meeting, which has been introduced in evidence?
A. No, I don't think I was a director at that time, but I was present.
Q. And you knew then, and you know now that the resolution recited this: "The property now owned by Henry A. Everett,
83 and The Northern Ohio Traction and Light Company, lying and being in Cuyahoga Falls Township, Summit County, Ohio, and described as follows," and then the property described is the same property you are seeking to appropriate in this action. You know that to be a fact?
A. I do.
Q. So at that time you knew that the Northern Ohio Traction & Light Company owned that property?
A. That was merely a formal indication that they represented that property as agents in my mind.
Q. So you never felt that the Northern Ohio Traction & Light Company owned the property?
A. No, and I don't know it now.
Q. And had the right to sell it, or deal with it?
A. No, and on the contrary I had the statement of your director that they did not.

Mr. Mather: I ask to have the answer excluded.
The Court: It may be excluded.

Mr. Mather:

Q. Who was the authorized agent on the part of the Cuyahoga River Power Company, your company, who was the authorized agent?
A. Mr. Bacon and myself.
Q. And your Board of Directors passed a resolution authorizing him to negotiate for this specific property?
A. Yes, sir.
Q. And those resolutions have been introduced?
84 A. Yes, sir.
Q. That's all.

The Court: Anything further Mr. Frank?

Redirect examination.

By Mr. Frank:

Q. Calling your attention to the first appropriation suit, which you spoke of, as having been begun and withdrawn, I will ask you to state the reason of the withdrawal of that suit?

Objected to.

The Court: What difference would it make?

Mr. Frank: Mr. Mather in cross examination called out the fact the suit was withdrawn.

The Court: That wouldn't make any difference whether it was withdrawn or not.

Recross-examination.

By Mr. Mather:

Q. Mr. Kimball, you are familiar with the petition filed—you are familiar with the petition in the case of The Big Cuyahoga Light Heat & Power Co vs. Henry A. Everett and others, that was taken from the probate court to the supreme court? You are familiar with that petition?

A. Yes, but that isn't what happened.

Q. It didn't go to the supreme court?

A. No.

85 Q. Now then, let me ask you whether the Big Cuyahoga Light Heat & Power Company, which was the predecessor of your company, that is to the Cuyahoga River Power Company, in that petition, made this allegation: "The above property—," and this statement follows the description of the same property which you are seeking to appropriate in this proceeding,—"the above property is owned, or claimed to be owned by The Northern Ohio Traction & Light Company, and The Akron Bedford and Cleveland Railroad claim some ownership in that property"? Did you make that allegation?

A. That's the suit against Everett?

Q. Yes, against Everett and others.

A. I think we did, but I wasn't a director. But I think that's a fact.

Redirect examination.

By Mr. Frank:

Q. You have stated to Mr. Mather that your company has not constructed any dams or reservoirs, or power houses, since its organization. Why haven't you constructed them?

A. We have been kept out of the river by litigation,—by the opposition of the Northern Ohio Traction & Light Company, and the Northern Realty Company, and the Norther- Ohio Power Company, and some other interests. We have been in constant litigation trying to secure title.

Mr. Mather: I ask to have the answer excluded.

The Court: It may stand.

Defendant excepts.

86 Recross-examination.

By Mr. Mather:

Q. And up to date you haven't secured title to any real estate?
A. I beg pardon, we have. We have equitable title to land, and that is title to real estate.
Q. You haven't appropriated any or paid compensation for any, or purchased any?
A. We haven't bought any private land, no.

Thereupon the plaintiff, for the purpose of further maintaining the issues upon its part to be maintained, offered as a witness WILLIS BACON, who being first duly sworn according to law, testified as follows:

Direct examination.

By Mr. Frank:

Q. You reside at Tiffin, Ohio?
A. Yes, sir.
Q. You are an attorney at law?
A. Yes, sir.
Q. And have been connected with the Cuyahoga River Power Company?
A. Yes, sir.
Q. And the same company under its name of The Big Cuyahoga River Light Heat and Power Company?
A. Big Cuyahoga Light Heat and Power Company.
87 Q. How long have you been connected with this company?
A. With the Big Cuyahoga Light Heat and Power Company, and the same, with its name changed ever since it was organized. I was one of the original stockholders if I remember correctly.
Q. What training and experience have you had in matters relating to water power, and hydro-electric matters?
A. Well I had a good scientific course in college in engineering, civil and hydraulic engineering, and I had an 18 month course taken privately at home of course, in hydraulic engineering before commencing this project in 1906, and I had had the experience of attempting to develop a power on the Cuyhoga River commencing in July 1906, and extending up to the time I became attorney for this company, and ever since I have been connected with this company in this development.
Q. Have you been over the territory that is embraced in the project of the plaintiff company?
A. I think I have been over every foot of it.
Q. And are you familiar with the project of the company?
A. I am sir.
Q. You say you have been over practically every foot of the ground?
A. I have.

Q. I call your attention to Plaintiff's Exhibit 20, and ask you whether you have seen that document before?

A. I have sir.

(Said exhibit is hereto attached, marked Plaintiff's Exhibit 20, and made a part hereof.)

88 Q. Was that document—were you present at a meeting of the board of directors April 23, 1909?

Mr. Mather: I object. He has already identified the document. We have not anything to contradict it.

Mr. Frank:

Q. Mr. Bacon, were you at any time in communication with the Northern Realty Company in reference to the purchase of the property described in the petition in this case?

Objected to.

The Court: Let him tell what he did. You may answer.

A. I was in conference with certain alleged officers.

Mr. Frank:

Q. And when and what did you do, and who did you see in that connection?

A. I think my first visit to any officer, or to the office of the Northern Realty Company was on January 16, 1911. That was in company with Mr. Kimball. We went to the office of Mr. Currie, who took us to the office of Mr. Davis, or rather to Mr. Will Christy's office, and he introduced us to Mr. Davis, and we had a talk.

Q. And what was your talk?

A. I can't give it word for word.

Q. The substance of it?

A. The substance of it was that we wanted to purchase the property or the ground on the Cuyahoga River, and indicated what property it was by reference to the former case that had been tried here, that is, a strip about 100 feet wide on either side of the river. That was a verbal communication we had then, and——

89 Q. Are you familiar with the property that was described in the petition in this case?

A. I am as familiar as one can be by a cognizance of it.

Q. Have you examined the description of the property there set forth?

A. I have.

Q. And on your occasion of your visit what, if anything, was said with reference to the property that you desired to negotiate for?

A. I don't think it was named out at that time in so many courses and lengths, giving directions and calls of the description, but referred to in general terms as a description of the property we had formerly undertaken to get from Mr. Everett.

Q. The persons that were there were Mr. Christy, Mr. Currie and Mr. Davis?

A. Mr. Davis and Mr. Currie. I didn't see Mr. Christy.

Q. Let me inquire whether you had met any of these gentlemen before in negotiating for the same property?

Objected to—objection overruled—defendant excepts.

A. I had met Mr. Currie. I never met Mr. Davis before to my knowledge in negotiating for this property.

Q. Following the 16th day of January, did you again—if you again saw or met the Northern Realty Company, state when and where, and who you saw?

A. In Company with Mr. Palmer, my father-in-law,—well I first phoned to Mr. Christy.

Q. Did you have a talk with Mr Christy by
90 phone?

A. Yes, from Tiffin, and asked him if he could see me that day, the 20th day of January, and in company with my father-in-law,—no, I think I first alone met Mr. Currie in front of the Hamilton Building, and asked him in substance as to whether or not they would sell that property that we had been talking about, and he said nothing doing, or something to that effect, and on some further talk he said: "If you don't believe me see Mr. Christy." And I suggested that I had better see Mr. Christy at any rate, and he said: "Perhaps you had." And at any rate my father-in-law and I visited Mr. Christy, who claimed to be president of the company.

Q. What did he say?

A. I asked him if he was president of the Northern Realty Company.

Mr. Mather: There is no question about that. He was President.

Mr. Frank:

Q. Go on.

A. I entered immediately into negotiations with him, and asked him if they would sell the property, and he said they would not part with the property at any price.

Q. Did you make an offer?

A. I had with me a copy of the offer that had been sent by mail on the evening of the 16th day of January, and I called his attention to it, and to the description and everything, and of course I didn't read off the description to him of the property I wanted, but asked him concerning the offer that we made, and he acknowledged receiving the offer by mail, but said that they would not
91 sell the property at any price. That was the substance of the whole talk. I don't think I was there over fifteen or twenty minutes.

Cross-examination.

By Mr. Mather:

Q. Where were you talking with Mr. Currie about this proposition?

A. On what day?

Q. On Any day?
A. In his office, and down on the street. On different days in his ce, and down on the street.
Q. You spoke of seeing Mr. Currie before you saw Mr. Christy?
A. I met Mr. Currie I think in front of the Hamilton Building, ut at the entrance, if that is the Hamilton Building where their ce is.
Q. You were talking to Mr. Currie because he represented the rthern Ohio Traction and Light Company?
A. No, because he represented he had the matter in hand for ing the property, him and Mr. Davis.
Q. Who was Mr. Davis?
A. He introduced him as the engineer.
Q. You don't know what work Mr. Davis was on?
A. I think Mr. Davis told me he was about to build a power house on these premises.
Q. You don't know how long he had been employed by the Northern Ohio Traction & Light Company to develop wer?
A. Not exactly.
Q. You have been hovering about and over this property for some rs either on your own account or for others?
A. What do you mean?
Q. You have been sort of shadowing it, and about the property a number of years?
A. Put it in definite terms.
Q. You have been here in 1906 and seven and about each year bsequent to that, up to the present time, with reference to this operty?
A. I have been here trying to promote this water power scheme ce July 1906.
Q. And so far you haven't made any development?
A. No, sir.
Q. You haven't built any dams?
A. No.
Q. Or power houses?
A. No.
Q. Or Reservoirs?
A. No.
Q. Or developed any of the water power?
A. No.
Q. Nor any transmission lines?
A. No.
Q. You haven't entered into any contract with munipalities for supplying electricity?
A. No, sir.
Q. Or private concerns?
A. No, sir.
Q. And so far as you know the Cuyahoga River Power Company s no property whatever except its engineers' reports?
A. I don't know to the extent——

Q. You don't know of any except the engineers' reports?

A. I don't know if they own those. I don't know of any property outside of hearsay evidence. I think we own—well, I will not state it.

Mr. Frank: State what you think you own.

Mr. Mather:

Q. I hand you Defendant's Exhibit A, and ask you to examine it and state what it is.

Mr. Frank: I suppose he is competent to tell whether it is his letter.

Mr. Mather: I want him to say whether it is or not.

Mr. Mather: That's one of your letters?

A. Yes, but I will see what it is before I say. I will not say what it is until I read it. Now what is it you asked me.

(A true copy of said letter is hereto attached at page 454-456 marked: Defendant's Exhibit A, and made a part hereof.)

Q. I asked you to state what it is?

A. That's a letter of mine to Will Christy. It purports to
94 have been mailed October 20th, 1906, and signed by myself.

Q. I hand you another document, which for the purpose of identification is marked Defendant's Exhibit B, and being in three sheets, is marked B-1, B-2, and B-3, and I will ask you to examine that and state what it is?

(A true copy of said letter is hereto attached at page 458-461, marked: Defendant's Exhibit B-1, B-2, and B-3, and made a part hereof.)

Q. Outside of the lead pencil marks.

A. They are in my writing, but they were put on afterwards when we were having some conference about this matter. They wanted some addition- proposition there and I put it in.

Q. It wasn't intended as a part of the letter?

A. Yes, sir. Not when the letter was sent, but this notation was put in at a conference with Mr. Henry A. Everett in Mr. Currie's office.

Q. Well, I am calling your attention to the manuscript outside of the lead pencil notations?

A. Yes, but I want to see what the lead pencil notations are. That's a letter sent to I suppose the Northern Ohio Traction and Light Company on February 1, 1907, and the pencil notations were put on by me afterwards in conference with Mr. Everett in Mr. Currie's office.

Q. Mr. Bacon, you knew as a matter of fact that this property was owned by the Northern Ohio Traction and Light Company?

A. No, I didn't know it. I knew they claimed to own it.

Q. You knew they owned the equitable interest in it?

95 A. No, I did not. I knew Mr. Currie said they did and Mr. Everett said they did not.

Q. What was that?
A. Mr. Currie told me The Northern Ohio Traction and Light mpany owned this property, and Mr. Everett told me they did not.
Q. Where was Mr. Everett when he told you that?
A. In his office.
Q. Who was present?
A. I don't know if any one was unless it was his stenographer.
Q. When was that?
A. The first or second time I saw Mr. Everett about this property irst talked to Mr. Christy and Mr. Currie and I went to Cleveland.
Q. Was that prior to this letter?
A. Yes.
Q. After that conversation you addressed this letter to The rthern Ohio Traction & Light Company?
A. Yes, sir.

Q. That's all.

Mr. Mather: I offer these as part of my cross-examination.
Mr. Frank: I object.
The Court: Do you object to the competency of them?
Mr. Frank: Yes. Those letters were all written before this comny was organized. They cannot make their defense on cross examination.

The Court: I will sustain the objection for the time being. You have identified them.
Mr. Mather: Very well. I will offer them later.

Q. At the time you talked with Mr. Christy immediately preceding e institution of this suit you had with you a written offer and d a written description of the property which is the property deibed in your petition in this suit?
A. I think so, it is connected with this deposition of mine.
Q. And that is the paper attached to your deposition—has this position been identified?
A. No.

Mr. Mather: Mark this Defendant's Exhibit C.

(True copy of said paper is hereto attached at page 403-408, arked: Defendant's Exhibit C and also marked Defendant's Exbit D, and made a part hereof.)

Q. I hand you defendant's exhibit C and ask you to find and fer to the paper which you had with you when you talked with r. Christy in regard to the purchase of this property?
A. Just repeat that question.
(Thereupon the question was read by the stenographer as follows: Q. I hand you defendant's exhibit C and ask you to find and fer to the paper which you had with you when you talked with Mr. aristy in regard to the purchase of this property?")
A. I think that's the exact copy I had with me when I visited Mr. aristy's office in company with my father-in-law.

Q. Just read it.

97 A. "Akron, Ohio, January 16th, 1911. The Northern Realty Company, Akron, Ohio. Sirs:—The undersigned hereby offers and tenders you Five Thousand Dollars for the property, a description of which is hereto attached. By reason of the fact that important negotiations depend upon your prompt acceptance or rejection of this proposition, we request your decision not later than Saturday noon, Jan. 21, 1911. Very truly, The Cuyahoga River Power Company, By Willis Bacon, its agent and attorney."

Q. Read the rest of it.

A. "If not called for in person mail reply to Willis Bacon, Tiffin, O.

Q. Is the description of the property immediately following what you have read,—beginning with the words: "Being the following described property: Situated in Summit County, Ohio, and beginning at the point of intersection of the center of the Cuyahoga River and the North and South Township line between Portage Township and Cuyahoga Falls township; thence north 0 degrees 30′ east 100 feet," and so forth; and ending with the words: "Contains three tenths acres more or less, with all the privileges, easements, rights and appurtenances thereunto belonging, all of the above property being in the Township of Cuyahoga Falls,"—a description of the property you referred to in your conversation with Mr. Christy and the description contained in the petition in this case?

A. I don't know. You will have to get the description and compare it. I think that's the exact copy I had along, and if it is, it is the property. If that paper you have reference to is the

98 copy sent by mail on the evening of January 16th to the Northern Realty Company, and if that is a correct copy, that's what we said.

Redirect examination.

By Mr. Frank.

Q. The property described in the petition is located where?

A. Located on both sides of the Cuyahoga River commencing, if I remember right at the Lower line of the Gorge Property belonging——

Objected to.

The Court: Go ahead. I want to hear it.

A. Commencing at the lower line of the Gorge property formerly belonging to Mr. Everett and then belonging to the Northern Realty Company and extending to the Upper Line of the Northern Realty Company, a strip 100 feet wide from the center line of the river, with the exception of the upper part it follows the course and lines laid down in the recorder's office here on that property by the Northern Realty Company.

The Court:

Q. How long a strip is that on each side of the river?

COPY BOUND CLOSE

A. I have a notion—I am just estimating it—it is in the neighrhood of a mile and three quarters, or perhaps two miles, and ntains as near as I can figure it out about forty acres.

Mr. Frank:

Q. At the time of your talk with Mr. Christy that you have referred to, was the property for which your offer was made, stated to Mr. Christy? What property were you talking out?

A. We referred to the property that I had in that copy.

Q. And was you familiar at that time with the state of the record e?

A. I was so far as could be found by looking at it.

Q. And in whose name on the records did the title stand?

A. In the Northern Realty Company.

Q. And are you able to state how long before that the title to the perty got into the Northern Realty Company?

A. I can't state exactly, but I suppose it was, if I remember htly, it was a couple of months.

Q. And prior to that time,——

A. That's the December previous.

Q. And prior to that time if you know in whom was the record e?

A. Henry A. Everett.

Q. And had been for how long a time?

A. I couldn't tell how long. It was purchased by him from the lbank heirs according to the records.

Q. Are you able to state whether or not when you had your conence with Mr. Christy he knew what property you were talking ut?

A. Yes, he surely knew what we were talking about.

Mr. Mather: I object. Well, I don't care, let it stand.

Mr. Frank:

Q. Mr. Bacon, I call your attention to a map attached to the deposition filed in this case of Mr. Daniel R. Bacon of w York City, marked in that deposition, Plaintiff's Exhibit Number Two, March 13, 1914, Jessie McLardy, Notary Public, and ask whether you have examined that map, and whether or not you familiar with it?

Said exhibit is hereto atached, marked as above stated, and le a part hereof.)

A. I am familiar with it.

Q. If you know by whom was the map prepared?

A. It was prepared,—no, I don't know exactly. It was prepared New York in that shape, but the map portion of it was prepared the United States Government topographical survey.

Q. From your knowledge of the project of the Cuyahoga River ver Company, are you able to state whether or not the section ountry covered by that project is shown on this map?

IN CENTER

A. It is, I am able to state that, yes, sir.

Q. Now then, I desire to call your attention also to the map——.

A. I stated the map portion of it was prepared by the United States Government. The original map was. It has been arranged by the engineers to show the scheme of the Cuyahoga River Power company.

Q. Those topographical maps are made by the government?

A. Yes.

Q. Have you seen the map attached to the deposition, marked in this deposition, under date of March 13, 1914, Plaintiff's Exhibit Two, Jessie McLardy, Notary Public?

A. Yes, sir, I have seen it and am familiar with it.

101 (Said map is hereto attached, attached to said deposition and marked Plaintiff's Exhibit Two, Jessie McLardy, Notary Public, and made a part hereof.)

Q. Do you know whether or not this map accurately sets forth the project of the Cuyahoga River Power Company?

A. It does the project as outlined by the von Schon report.

Q. And have you examined this map in connection with the topographical map, Exhibit One, attached to the deposition, so as to know the comparative scale on which the two maps are drawn?

(Said map is hereto attached, attached to said deposition and marked plaintiff's Exhibit One, Jessie McLardy, Notary Public.)

A. I have—well I don't know as to scale but I believe it's the same scale. I never looked at it as to scale, but it apparently shows the entire thing taken from a topographical map, rivers a little enlarged.

Q. And it correctly shows the project of the Cuyahoga River Power Company, according to the von Schon plan?

A. It does.

The Court: Are you offering those maps in evidence?

Mr. Mather: They are already a part of the deposition, are you going to offer the deposition?

Mr. Frank: Yes.

Mr. Frank:

Q. From your knowledge and familiarity with the plan and project of the Cuyahoga River Power Company are you able to state whether or not in the event that project is constructed and development made, the property described in the petition here is necessary to carry out the project?

A. I am able to state so, yes, sir.

Q. And is it necessary?

A. Absolutely necessary. It could not be constructed without.

102 Cross-examination.

By Mr. Mather.

Q. Are you familiar with the location of the steam power plant

he Northern Ohio Traction & Light Company and the location
ts hydro-electric plant, and the dam?
. In a general way.
. What would you say the effect of that project would be to the
perty of the Northern Ohio Traction & Light Company?
. What do you mean by effect?
. As to the uses of the property described in the petition.

bjected to.
he Court: I think that's a question of defense.
Ir. Frank: The power house wasn't there when the proceeding
commenced.
he Court: You may answer.
laintiff excepts.
he Court: I believe I will sustain the objection to that question.
Ir. Mather: Note and Exception. If the Court Please, this is
erent from the ordinary proceeding. We have no answer. The
ute makes the issues and where they put on a witness and attempt
rove something to the effect that they have the judicial right
nake the appropriation, I take it anything that tends to prove
isprove that right is competent, whether it comes from our wit-
es or theirs, and the line of proof is not followed and could not
be followed as in the ordinary civil action in which there are
pleadings before the court. The Statute makes the issue.
The Court: Objection sustained.
efendant excepts.

hereupon the Plaintiff, for the purpose of further maintaining
issues upon its part to be maintained, offered as a witness, one
HARD F. PALMER who being first duly sworn according to law
fied as follows:

Direct examination.

By Mr. Frank:

. Your name is Richard F. Palmer?
. Yes, sir.
. And you live in Akron?
. Yes, sir.
. You are acquainted with Mr. Willis Bacon?
. Yes, sir.
. And likewise with Mr. Will Christy?
. Yes, sir.
. I will ask you whether or not you at one time accompanied
Willis Bacon to the office of Will Christy?
. I did.
Q. Can you tell us when it was?
A. It was on the 20th day of January, 1911.
Q. And did you make—did you see Will Christy in his
e?
. I did.
. Was there a conversation between Mr. Christy and Mr. Bacon?

A. There was.
Q. Tell us what that conversation was?
A. Well in general terms Mr. Bacon inquired of him first if h was the president of the Northern Ohio Traction & Light Compan and he replied that he was. He then asked him if he had receive a proposition from him for the purchase of the Gorge property an he said that he had. And he wanted to know if he had considered i and he said he had not, and Mr. Bacon said I am here to renew th proposition and make you a price for this property. Mr. Chris replied that he would not entertain any proposition. That th property was not for sale, and that he would not entertain an proposition for the purchase of it.
Q. Did Mr. Bacon make an offer on that occasion?

Objected to.
The Court: Just tell what he said.
A. I am not absolutely certain about that deal.

Mr. Frank:

Q. Do you remember any further conversation?
A. That's practically all there was referring to this.
Q. You have mentioned the Norther- Ohio Traction & Lig Company, was that the name that was given or The Northe
105 Ohio Realty Company?
A. The Northern Ohio Realty Company was the nam The only thing I remember in that conversation is in regard to t directors of the company. Mr. Bacon inquired who were the dire tors and he said they were practically the same as the incorporato
Q. Was anything said as to any relation between the directo of that company and the directors of the Northern Ohio Tractio and Light Company?
A. Not that I remember.

Cross-examination.

By Mr. Mather:

Q. Did Mr. Davis have with him at that time any writing?
A. Mr. Bacon you mean?
Q. Yes.
A. I am not sure about that. I am not certain about that s
Q. That's all.

106 Thereupon the Defendant, for the purpose of further mai taining the issues upon its part to be maintained, recalled, f further cross examination, WILLIS BACON who being duly swo according to law, testified as follows:

Re-cross examination.

By Mr. Mather:

Q. Mr. Bacon, I hand you a document, which for identificati has been marked Defendant's Exhibit D, and I will ask you examine it and state what it is?

A. Well, it's what it purports to be on its face, a provisional offer for that property, or an alternative offer. Do you want to know whose signature that is, and so forth?

(A true copy of said Exhibit D is hereto attached at page 403-408, marked Def't's Exhibit D, and made a part hereof.)

Q. Yes?
A. It's the signature of the Cuyahoga River Power Company by myself, it's agent and attorney.
Q. Did you mail that to the Northern Realty Company?
A. I mailed it to the Northern Realty Company at exactly the same time I mailed the other one.

Mr. Mather: Can we agree on these two offers? You want them introduced as well as we I take it, and you haven't introduced them as yet.
Mr. Frank: No, I haven't.
Mr. Mather: One description of property covers two offers, one is an offer for $5,000——
Mr. Frank: You didn't make any reply—no written reply?
107 Mr. Mather: No, I don't think we did.
Mr. Mather: Examine those and if they are copies we will introduce them as exhibits.
Mr. Frank: If Mr. Bacon says they are copies we will make no objection.
Mr. Mather: It is agreed between counsel that defendant's exhibit D, are correct copies of the written offers mailed by plaintiff to the Northern Realty Company and include a description of the property like that contained in the petition.
Mr. Frank: The same property described in the petition.
(True copy of said Exhibit D is hereto attached at pages 403-408 marked Defendant's Exhibit D and made a part hereof.)

Mr. Mather:

Q. Defendant's exhibit D, that is a copy of the paper which you say you had with you when you interviewed Mr. Christy, Mr. Bacon?
A. Both of these are defendant's exhibit D?
Q. Yes.
A. Yes; I am not positive that I had the alternative offer, the one for the $4,000, with easement, but it had been mailed at the same time the other one was mailed. I am not sure it was under the same envelope.
Q. The description of real estate was identical.
A. We intended it to be the same description.
Q. And was the description you had before you when you talked with Mr. Christy?
A. I haven't compared your copies, but the description
108 accompanying both offers was the description of the property here.

Mr. Frank: I want to offer in evidence now Plaintiff's Exhibits 19, and 19-A.

Mr. Mather: We object.

Mr. Frank: And Plaintiff's Exhibit 20, which is the Von Schon plan. And plaintiff's exhibit 21, which is the printed copy referred to in the meeting of April 23, 1909.

Mr. Mather: We object to all of them.

The Court: They may be admitted.

Mr. Mather: Note our exceptions.

Mr. Frank: I now offer the Depositions,—I'll read the deposition of Daniel R. Bacon, taken at New York City, on the 13th day of March, 1914, under notice attached to the deposition.

Mr. Mather: Are you going to read them?

Mr. Frank: Yes.

Mr. Mather: Why can't they be offered with the agreement that defendant objects to the introduction of the depositions on the ground that they are incompetent and irrelevant.

Mr. Frank: That is, they go in subject to an objection on your part?

Mr. Mather: Yes.

Mr. Frank: I am satisfied.

Mr. Mather: Our objection to the depositions are that they purport
to be the depositions of two experts, who testified to the
109 project and plan of the Cuyahoga River Power Company, and
we claim there is nothing which shows that it is the project and plan of the Cuyahoga River Power Company.

The Court: Do the depositions themselves show they have gone over the plans and specifications submitted by the engineers?

Mr. Mather: No.

Mr. Frank: There is no objection on the ground of notice or anything of that sort?

Mr. Mather: No, we were there, and we can't object to that.

The Court: They may be admitted for the present.

Defendant excepts.

Mr. Frank: We rest in chief.

The Court: Call your witnesses.

110 Thereupon, the Defendant, for the purpose of further maintaining the issues upon its part to be maintained, offered as a witness, FRED S. BORTON, who being duly sworn according to law testified as follows:

Direct examination.

By Mr. Mather:

Q. Your name is Fred S. Borton?

A. Yes, sir.

Q. And you reside in the city of Cleveland?

A. Yes, sir.

Q. Mr. Borton, state what position, if any you held with the Akron Bedford and Cleveland Railroad Company in 1897?

A. I was Secretary of the Company.

Q. And had you been secretary of that company since its organization?

A. I had.

Q. Do you—are you acquainted with the property which was deeded by Millbank to Henry A. Everett, and known as the Gorge Property?

A. Very well.

Q. Where is that property located?

A. Running from Cuyahoga Falls, down the Cuyahoga river, on which the present Gorge Power Plant is located.

Q. And does it embrace and include the bed and stream of the Cuyahoga River?

A. It does.

111 Q. And the banks on either side?

A. On either side.

Q. Do you know when that property was purchased, or about when?

A. I am not familiar enough with the date to give the date.

Mr. Mather: I will introduce the deed later. This is preliminary. For your information it was December 14, 1897, and I will introduce the deed.

Q. Do you know who paid the consideration—(Objected to) for the property purchased at that time and deeded to Jeremiah Millbank, by his executor and executrix to Henry A. Everett?

Objected to.

The Court: How could you claim that was material?

Mr. Mather: We expect to show that The Northern Ohio Traction and Light Company has always owned this property. That it was not the property of the Northern Realty Company; that it was purchased originally by the Akron, Bedford and Cleveland Railroad Company, and that Henry A. Everett was the bare and naked trustee of the legal title. That later the Northern Ohio Traction & Light Company succeeded to all the property rights of The Akron Bedford and Cleveland, and owned this property long before this suit was instituted, and will follow that up by the development of this identical property, for identically the same purpose for which they are seeking to appropriate it. The property was never conveyed by Henry A. Everett until he conveyed it less than

112 a month before this suit was commenced.

The Court: You may answer the question.

Plaintiff excepts.

A. The property was paid for by the A. B. C. Railroad.

Mr. Mather:

Q. By the A. B. C. Railroad, you mean what?

A. The Akron Bedford and Cleveland Railroad.

Judge Davis: We don't want to interpose an objection to every

question. We wish it understood we object to this whole line of this testimony, and have our exception.

The Court: Yes.

Mr. Mather: Do you know what company later succeeded to all the property rights of the Akron Bedford and Cleveland Railroad Company?

Objected to.

The Court: The deed or contract would be the best evidence.

Mr. Mather: If they want us to introduce two or three volumes of corporation records we can do it.

Q. How long after 1897, or after this property was purchased Mr. Borton, did you continue as secretary of the Akron, Bedford and Cleveland Railroad Company?

A. I don't remember.

Q. Do you know as a matter of fact who paid the taxes on this property after it was purchased and deeded to Henry A. Everett?

A. If I could answer that by saying, the property was cared
113 for by the company exactly as all other property of the company.

Q. Do you know whether Mr. Henry A. Everett at the time or soon after *the* acquiring this property entered into any writing that had relation to the nature in which, and the manner in which, the property was held by him?

A. I do know that.

Q. Do you know where that document is?

A. I do not.

Mr. Mather: We will later show that that document was lost, and cannot be found. I have copies of parts of it and remember in substance the declarations, but what I want Mr. Borton to testify to is the contents of that, and we will make his answer competent by the testimony of other witnesses.

Judge Davis: We object to that.

Mr. Mather:

Q. Did you prepare that writing Mr. Borton?

A. The declaration of trust?

Q. Yes, sir.

A. I did.

Q. Did you write it out yourself?

A. It was a typewritten document.

Q. Did you dictate it?

A. It was prepared for us by our attorneys.

Q. Have you seen it?

A. Yes, sir.

Q. Do you know whether Mr. Henry A. Everett signed it?

A. I do.

Judge Davis: Why don't you produce him? We object to that answer.

14 Mr. Mather:

Q. Do you know Mr. Henry A. Everett?
A. I do.
Q. What would you say as to his physical condition, is he able to testify in a lawsuit?
A. He is not.
Q. Is he in such shape that his deposition could be taken ?
A. No.

Cross-examination.

By Mr. Frank:

Q. Mr. Everett attends meetings of the board of directors of the Northern Ohio Traction & Light Company?
A. He does.
Q. Where does Mr. Everett live?
A. Willoughby, Ohio.
Q. And what official position does he hold in the Northern Ohio Traction & Light Company?
A. He is the president of the company.
Q. And have you any official position with the traction company now?
A. I am one of the directors.
Q. And Mr. Everett is also a director?
A. He is.
Q. Your directors meet how often?
A. Once a month.
115 Q. Mr. Everett attends those monthly meetings?
A. Largely—most of the time.
Q. And presides at the meetings?
A. He does not.
Q. Mr. Everett is a stockholder in the traction company?
A. He is.
Q. How much stock does he hold?

Objected to—objection sustained.

Mr. Mather: This whole line is incompetent because Mr. Everett is no more competent to testify as to that declaration of trust that any other person.

The Court: Go ahead.

Mr. Frank:

Q. When was this document you have spoken of signed?
A. I am not able to give any dates in that connection. It's a number of years ago, and I would not be able to remember them of course.
Q. Where was it signed?
A. I don't know.
Q. You don't know where it was signed?
A. I do not at this moment.
Q. Was it placed on record in any recorder's office?

A. Filed in the company's office only.

Q. In the company's office only—you say you don't know where it was signed?

116 A. No.

Q. You don't know then that you were present when it was signed?

A. I prepared the article for Mr. Everett's signature, and carried it through until it was finished, and saw that the paper was filed with the company's papers.

Q. You don't know that it was signed in your presence?

A. No.

Q. You have no—you have no recollection of the actual fact of signing it?

A. No.

Q. Your recollection extends to the preparation of a document and afterwards carrying that document in the company's files?

A. The completed document in the company's files.

Q. When did you last see the document?

A. My answer is that I have not been associated officially with the company for a number of years; I have had no reason to see it.

Q. As near as you can tell us when did you last see the document—have you seen it since your typewriter prepared it?

A. I saw it when it was prepared and signed finally,—and fully completed.

Q. When you speak of filing it, what do you mean? What did you do with it?

A. Put it away with the company's papers, with the valuable papers.

117 Q. Where was your office at that time?

A. In the Garfield Building in Cleveland.

Q. You severed your official connection with the company on what date?

A. I don't remember.

Q. Can you tell us about when?

A. I can tell by the records. My records of meetings will show.

Q. I infer from your answer that you were secretary of the street railroad company known as the A B and C?

A. Akron Bedford and Cleveland.

Q. And were you—did you ever hold any other official position with that company except as secretary?

A. The Akron Bedford and Cleveland?

Q. Yes?

A. No.

Q. Can you tell how long you were secretary of that company?

A. Only by referring to the record book.

Q. If you have your record book there of the company tell us how long you were secretary of the company by referring to it, if you can?

A. All right. While I am turning these leaves I can answer any other questions. I was secretary at the record of the last meeting included in this book, which was July 3, 1899. I was secretary at

e last meeting included in this book, July 3, 1899, held at 615 arfield Building.

Q. At that time had the title to this property already been taken in Mr. Everett's name in 1899, do you know?

A. It was taken at the time of the purchase.

Q. Do you know whether that was as early as 1899?

A. It was earlier. It was 1897.

Q. The record book which you have there is that the record ok of the Akron Bedford and Cleveland Railroad from its organi-tion?

A. It is.

Q. Have you any record of the Akron Bedford and Cleveland mpany there, directing or authorizing the purchase of this Gorge operty—have you such a record?

A. I haven't been asked to look over the record for that purpose, t I assume the officers of the company have that.

Q. Do you know of any such record?

A. I neither know of it nor against it. I haven't read the record r years.

Q. Do you know why the title to that property was taken in Mr. verett's name?

A. I—

Q. Do you know?

A. Do, I know? Yes.

Q. Tell us?

A. Properties were bought at the time of the organization of the mpany, some small parts of which might be sold if it seemed sirable, and it was always thought if this real property became rt of the property covered by the mortgage of the company it could not as readily be disposed of as if it were done in that way.

Redirect examination.

By Mr. Mather:

Q. You were also at the time a director of the Akron Bedford d Cleveland Railroad?

A. I am not sure of the time, I was director during part of the me.

Q. Do you know for what purpose the Millbank or Gorge prop-ty was acquired by the Akron Bedford and Cleveland Railroad mpany?

Objected to—objection overruled—plaintiff excepts.

A. It was bought for the purpose of future development.

Q. For what purpose?

A. For water power.

Q. Are you acquainted with Mr. Henry A. Everett's signature?

A. Very well.

Q. You have seen it frequently or not?

A. Very frequently.

Q. Many times?
A. Many times.
Q. Did you see a signature to the instrument which you have termed a declaration of trust on the Millbank property?
A. Yes, sir.
Q. What would you say as to whether or not it had on it Henry A. Everett's signature at the end of the typewritten document?
A. It did.

120 Recross-examination.

By Mr. Frank:

Q. At the time this property was purchased your company had in mind the construction of a track from the Gorge Road along the old race bank of a race northerly to Cuyahoga Falls, did you not?
A. Northerly to Cuyahoga Falls?
Q. Yes.
A. I never heard it mentioned.
Q. And you know that where your railroad track crossed the Cuyahoga River up at the Gorge, what is called the Gorge, you know that place?
A. Very well.
Q. You know that just beyond it there was, prior to 1899 a steep up-grade as you left the river bank?
A. Yes.
Q. And in addition to being a steep grade there was a sharp curve that made an angle of fully ninety degrees, was there not a curve of ninety degrees?
A. Outside of the technicalities I remember there was a bad curve and grade.
Q. And that the tracks of the company were on the outer edge of the highway and next to a very steep precipice that sloped down to the river, you remember that?
A. Yes.

Q. And you remember also, do you not, that on this Gorge
121 property purchased from Mr. Millbank there was the remains of an old race way and race way bank?

A. Yes.
Q. Did your company not at that time have in contemplation the construction of a track from the river bank just before reaching that steep grade up along that raceway bank to get into Cuyahoga Falls on an easier grade?
A. I never heard it mentioned.
Q. That's all.

Mr. Frank: You understand that our objection extends to all that line of testimony, so that we will get the objections and exceptions.

Witness: One of the earlier questions asked me was whether I was secretary of the company at the organization, and I was not.

nerely want to correct that. I succeeded Mr. Beilstine in the very ly meetings, as is shown by the record.

Thereupon the defendant for the purpose of further maintaining e issues upon its part to be maintained, offered as a witness, one F. Moore who being duly sworn according to law testified as lows:

Direct examination.

By Mr. Mather.

Q. Your name is C. F. Moore?
A. Yes, sir.
Q. And you reside in the city of Akron?
A. Yes, sir.
Q. What is your position with the Northern Ohio Traction & Light Company?
A. Secretary.
Q. And how long have you been secretary of that company?
A. Since the organization of the company.
Q. And do you recall the date the company was organized?
A. I think the 29th of December, 1902.
Q. I hand you here a book, marked Defendant's Exhibit E, and you to examine it and state what it is?
A. It's the record book of the Northern Ohio Traction Company.

(Said exhibit and question are later withdrawn and said exhibit not attached hereto for that reason.)

Q. Does it contain the records of any other company besides the rthern Ohio Traction Company?
A. No, sir.
Q. I call your attention to page——

Mr. Mather: Withdraw that entire question and exhibit.

Q. I hand you paper marked defendant's Exhibit E, and ask to examine it and state what it is?
A. It's a certified copy of the original agreement between the ron Traction and Electric Company and the Akron Bedford and veland Railroad Company.

A true copy of said paper is hereto attached at page- 409-430, rked: Defendant's Exhibit E, and made a part hereof.)

Q. Does this recite that the consolidated companies' name is known as The Northern Ohio Traction & Light Company?
A. I believe it does.
Q. Were the Akron Bedford and Cleveland Railroad and the ron Traction and Electric Company, consolidated at this time?
Objected to.
Q. What became — the consolidated company mentioned in this ibit?
Objected to.

The Court: Oh, you may answer.
Plaintiff excepts.

Mr. Mather:

Q. What company became the consolidated company mentioned in this exhibit?
A. The Northern Ohio Traction Company.
Q. Did the Northern Ohio Traction Company later change its name to the Northern Ohio Traction and Light Company?

Objected to.

The Court: The certificate is the best evidence.
Mr. Mather: We will furnish the certificate if the court or counsel insist on it.
The Court: That doesn't go to the merits of this any way.

Mr. Mather:

Q. I hand you document marked Defendant's Exhibit F, and ask you to examine it and state what it is?

Mr. Frank: I object to his stating the contents of it.

(Said exhibit is hereto attached at page 88, marked: Defendant's Exhibit F, and made a part hereof.)
A. This is a payment of the $20,000 mortgage, the last payment on the Gorge property.

DEFENDANT'S EXHIBIT F. (TRUE COPY)

Form 5 311 6-10-13 21657

No. 6459 $ 20,151.67

Jos. Milbank and Elizabeth M. Anderson.
New York.

For Payment of Note.

Month of January 1916.

The Northern Ohio Traction and Light Company

MISCELLANEOUS

Expense Account		10.00	
Material on Hand, Cuyahoga Falls			
"XXXXXXXXXX			
Electrical Supplies			
The Gorge Property		20,000.00	
Interest Prepaid		141.67	

1	Supt. Ways and S.				Brought		
2	Ball			54	Mis. p'rp't mp. & ex.		
3	Ties			55	Sub st'a mp. and exp.		
4	Rails			56	Power purchased		
5	Rail F'st'ng & Joints			57	Power exch'n'd Bal.		
6	Specia Work			58	Other operations, Dr.		
7	Underground con'ts			59	Other operations, Cr.		
8	R. and T. Labor			60	Pass. con., mot., tr'm		
9	Paving			61	Ft. & ex. " " "		
10	Misc. R. & T. exp.			62	Mis. car service emp.		
11	Cleaning & Sanding			63	Mis. car service exp.		
12	Remov, snow, ice, s'd			64	Station employees		
13	Tunnels			65	Station expenses		
15	Bridg., trus, & culv.			66	Carhouse employees		
16	Cross'gs, fence, signs			67	Carhouse expenses		
17	Signal & in'tl'k'gsys			68	Op. sig'l int'tl'k'g sys		
18	Tel. & telg. systems			69	Op. tel. & telg. sys.		
19	Other mis. way exp.			70	Ex. frt. coll'ns & deliv.		
20	Poles and fixtures			71	Loss and damage		
21	Undergr'd conduits			72	Other transp'n exp.		
22	Transmission system			73	Sal. & ex. gen. of'rs		
23	Distribution system			74	Sal. ex. gen. of cks.		
24	Misc. electric line exp.			75	Gen. of Sup. & ex		
25	Buildings & structures			76	Law expenses		
26	Dep'c'n way & str's			77	Relief Dept. exp.		
27	Other operations, Dr.			78	Pensions		
28	Other operations, Cr.			79	Mis. general exp.		
29	Super. of equipment			80	Other operations, Dr.		
30	Power plant equip't			81	Other operations, Cr.		
31							

Brought.....

TRANSMISSION

209 Sub station wages.....
210 Maint. trans. lines.....
211 Sub station sup. & exp.....
212 Maintaining sub station buildings.....
213 " " " equipment.....

STORAGE BATTERY

214 Wages.....
215 Supplies.....
216 Battery repairs.....
217 " accessories.....

DISTRIBUTION

218 Wages.....
219 Supplies and expenses.....
220 Set'g and rem. meters and transformers.....
221 Underground conduits.....
222 Overhead dis. lines.....
223 Underground dis. lines.....
224 Services.....
225 Transformers.....
226 Meters.....

UTILIZATION

227 Commercial arc installation.....
228 Inspection customers' premises.....
229 Municipal arc installation.....
230 " incandescent installation.....
231 Commercial arc repairs.....
232 " incandescent renewals.....
233 Repairs customers' installation.....

25 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Ravenna.....
" Barberton.....
" A.....
" B.....
" Beach City.....
" Canton.....
" High St.....
" Midvale.....
" Macedonia.....
" Gorge.....
" Kenmore Barn.....
30 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
31 Ravenna.....
" Bedford.....
" Barberton.....
" A.....
" B.....
" Canton.....
" Massillon.....
" Beach City.....

Brought.....
" Kenmore Barn.....
51 Akron.....
" Cuyahoga Falls.....
51 Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
52 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Midvale.....
" Canton.....
" Gorge.....
53 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
54 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
55 Ravenna.....
" Bedford.....

124 *Statement.*

Principal		$20,000.00
Interest Dec. 14th 1905 to Feb. 4th, 1906, at 5% (1 month—21 days)		141.67 [1]*
Release	$5.00	
Bank Charge	5.00	10.00
Total		$20,151.67
[If not paid Till Feb. 5th add		2.77]*
		[———]*
		[$20,154.44]*

125 The Northern Ohio Traction & Light Company to Thomas W. Culdwell, Att'y for Jos. Milbank and Elizabeth M. Anderson.

Jan'y 31, Note secured by mortgage on Gorge Property	$20,000.00
Int. on same from Dec. 14/05 to Feb. 4/06	141.67
Charges for release	5.00
Bank " " making exchange	5.00
	20,151.67

O. K.
C. F. M.

Received February 1, 1906, of The Northern Ohio Traction and Light Company, twenty thousand one hundred and fifty one and 67/100 dollars in full of the above account.
$20,151.67.

THOS. W. CAULDWELL,
Att'y for Elizabeth M. Anderson and Joseph Milbank.

126 The Northern Ohio Traction & Light Co. No. 5786.

AKRON, OHIO, Jan. 31, 1906.

Pay to the order of Chas. Currie, General Manager $20,151.67 Twenty thousand one hundred and fifty one & 67/100 Dollars.
To The Central Savings & Trust Co. Akron, Ohio.

THE NORTHERN OHIO TRACTION & LIGHT CO.
J. R. NUTT, *Treasurer.*

[Endorsed:] Pay to Thomas W. Cauldwell Att'y for Joseph Milbank and Elizabeth W. Anderson or bearer. Chas. Currie, Gen. Manager.

127 DEFENDANT'S EXHIBIT F.

128 Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

[1]* Words and figures enclosed in brackets erased in copy.]

129 Mr. Mather:

Q. Are you able to state Mr. Moore, from personal knowledge who paid the mortgage on the Gorge property? After it was purchased from Mr. Millbank?

Objected to—objection overruled—plaintiff excepts.

A. The Northern Ohio Traction and Light Company.

Q. Do you know how much the mortgage amounted to?

A. $20,000.00.

Q. And that, with interest, was paid by the Northern Ohio Traction and Light Company?

Objected to—objection overruled—plaintiff excepts.

A. Yes, sir.

Q. Do you know as a matter of fact who paid the taxes on the Gorge property from the time the Northern Ohio Traction and Light Company was organized to the present time?

Objected to—objection overruled—plaintiff excepts.

A. The Northern Ohio Traction and Light Company paid the taxes.

Q. Do you know who has had possession of the Gorge property since it was purchased from the Millbanks in 1897?

A. The Northern Ohio Traction and Light Company.

Q. That is from the time the Northern Ohio Traction and Light Company was organized?

A. Yes, sir.

Q. What has it done with respect to that property to your knowledge, not only so far as the development of power is con-

130 cerned, but with respect to any other buildings or structures and superintending it?

Mr. Frank: Prior to the commencement of this suit.

Mr. Mather:

Q. Prior to the 20th day of January 1911?

A. Negotiations were had with power engineers for developing the water power on the property and some expenditures were made

Q. Have any buildings of any kind or character been built on the Gorge property prior to January 20, 1911? Who built the pavilions and buildings of that sort?

A. The pavillion was built, I think originally by the Akron Bedford and Cleveland railroad.

Q. It was on at the time the Northern Ohio Traction and Light Company bought it?

A. Yes, sir.

The Court: What pavillion is that?

A. The dancing hall.

Mr. Mather:

Q. Has anybody else than The Akron Bedford and Clevelan

Railroad Company or the Northern Ohio Traction and Light Company exercised any rights over that property to your knowledge?

Objected to.

The Court: Tell what they have done Mr. Moore with regard to that property.

A. A large power house has been built——

Mr. Mather: No, I mean what has anybody other than the Akron Bedford and Cleveland railroad or the Northern Ohio Traction and Light Company had to do with the property?

131 A. No other company has had anything to do with it except some subsidiary companies.

Q. Any individuals?

A. No, not that I know of.

Q. I hand you a book marked Defendant's Exhibit G, and ask you to examine it and state what it is?

A. That is record book number one of the Northern Ohio Traction and Light Company.

Q. Calling your attention to page 194 of that book I will ask you to state what those minutes are a record of?

Objected to—objection overruled—plaintiff excepts.

A. Those minutes are a record of the directors' meeting held October 8, 1906.

(True copy of said exhibit is hereto attached at page 92 marked: Defendant's Exhibit G, page 194, and made a part hereof.)

Q. Were you secretary of the meeting?

A. Yes, sir.

Q. Were you present?

A. Yes, sir.

Q. Are you able to say whether or not that is a correct recitation of the things done by the directors at that meeting?

A. It is.

132 (True Copy of: Defendant's Exhibit G page 194.)

"A proposition for the leasing of the Gorge property for 99 years at $2400 per year and taxes by Willis Bacon, Attorney at Law, Tiffin, Ohio, was submitted to the board, and after a thorough discussion of the same, upon motion, duly seconded, was rejected.

"The question of the utilization of water power on the property known as the "Gorge" was discussed, and on motion, the Vice President, was authorized to procure data on the development of the same and report to the board.

Defendant's Exhibit G, page 194.

133 Mr. Mather: I want to read from page 194, of the record, the following:

(Thereupon Counsel read said Exhibit G, page 194, to the court. Said exhibit is hereto annexed at page 92.)

Mr. Mather:

Q. Do you know as a matter of fact Mr. Moore whether or not anything was done — what was done with respect to the Gorge property so far as The Northern Ohio Traction and Light Company was concerned in the matter of ascertaining its value for water power purposes?

A. Engineers have done some work from time to time.

Q. Made reports?

A. Yes, sir.

Mr. Mather: We offer page 194, beginning with the words: "The proposition for the leasing of the Gorge—" and ending with "report of the board."

(A true copy of said exhibit is hereto attached at page 92 marked: Exhibit G, page 194, and made a part hereof.)

Mr. Mather:

Q. I hand you book, marked Defendant's Exhibit H, which has printed on the back thereof: "Record Book No. 2, Northern Ohio Traction and Light Company," and ask you to examine it and state what it is?

A. That's record book number two of the Northern Ohio Traction and Light Company.

134 Q. I call your attention to page 161, and ask you to state what that purports to be a minute or record of?

(A true copy of said Exhibit is hereto attached at page 94, marked: Defendant's Exhibit H, page 161, and made a part hereof.)

A. That's a record of the meeting of the board of directors on February 25, 1910.

Q. Were you secretary of that meeting?

A. Yes, sir.

Q. Were you secretary of the company at that time?

A. Yes, sir.

Q. Are you able to state that the things recited on that page are correct as a report of the things done by the directors at that meeting?

A. Yes, sir, they are.

Mr. Mather: I offer in evidence from page 161, this language,—

Objected to—objection overruled—plaintiff excepts.

(Defendant's Exhibit H, page 161.)

Mr. Mather: "The advisability of employing an expert for the purpose of securing a suitable location, devising plans, specifications, etc., for a new power house was discussed and on motion duly seconded and unanimously carried the power committee was authorized and given full power to employ experts for the above mentioned purpose." (Defendant's Exhibit H, page 161.)

135 Mr. Mather:

Q. I call your attention to page 183, of the same record book, and ask you to state what that purports to be?

(Said Exhibit is hereto attached, at page 95, marked: Defendant's xhibit H, page 183, and made a part hereof.)

A. That's a part of the minutes of December 30, 1910.
Q. That is a record of the meeting of the board of directors of the orthern Ohio Traction and Light Company held at that time?
A. Yes, sir.
Q. Were you secretary of that meeting?
A. Yes, sir.
Q. And secretary of the company at that time?
A. Yes, sir.
Q. Are you able to say whether the things recited in that record re a correct description of the things done by the board of direcrs at that meeting?
A. Yes, sir.

Mr. Mather: I offer from page 183 the following, which I will ad into the record:
(Defendant's Exhibit H, page 183.)
"Resolved that the officers of the company be authorized to purhase approximately 57 acres of additional property at the Gorge a price not to exceed $10,000 for the purpose of improving and veloping water power.
"On motion duly seconded and carried the employment of W. E. avis at a salary of $6,000 for one year as an electrical engineer nd superintendent of construction for the building of the new ower plant at the Gorge is hereby ratified and approved."
(Defendant's Exhibit H, page 183.)

36 Mr. Mather:

Q. Now, Mr. Moore, did you ever see a writing purporting to have een signed by Henry A. Everett with respect to the title to the orge property purchased from Millbanks, and deeded by Millnks to Everett?
A. Yes, sir.
Q. Have you had it in your possession?
A. Yes, sir.
Q. What kind of an instrument was it, typewritten or otherwise?
A. Typewritten.
Q. How long did you have it in your possession?
A. Well it's been in the possession of the company ever since I ave been with the company I think.
Q. And that was beginning what year?
A. I originally started there—the first of May it will be fifteen ears.
Q. Do you know where that document is now?
A. I do not.
Q. Where was it kept when it was in your possession?
A. It was kept in our vault.
Q. Have you seen it from time to time?
A. Yes, sir.

137 Q. When did you last make a search for it?
A. I searched for it a number of times in the last few days.
Q. Are you able to find it?
A. No, sir.
Q. Are you familiar with the signature of Henry A. Everrett?
A. I am.
Q. Would you say his signature was attached to that document?
A. It was.
Q. At the end of it?
A. Yes, sir.
Q. Do you remember of ever having handed the document over to me?
A. Yes, sir.
Q. Do you remember when that was?
A. Well it was two or three years ago.
Q. About the time Mr. Bacon began his other suit here for the Cuyahoga River Light Heat and Power Company?
A. Yes, sir.
Q. And you haven't seen it since?
A. I haven't seen it since.
Q. Do you know anything about the contents—do you remember the contents of the things recited in that instrument?
A. Not word for word. It was a deed of trust.
Q. That's what you term it—well that's all.
138 A. A declaration of trust rather.

Mr. Mather: I think that's all.

Cross-examination.

By Mr. Frank

Q. So you gave that writing to Mr. Mather?
A. Yes, sir.
Q. When was that?
A. Two or three years ago. I don't remember exactly.
Q. You don't remember the contents of the paper?
A. No, I can't say just what the contents were—any more than it was a declaration of trust reciting the property there in question.
Q. Does your company have any system of keeping copies of records in your files?
A. Well——
Q. Copying into books or otherwise?
A. We usually do have copies.
Q. Have you—do you have a copy of this document?
A. No, we do not.
Q. Do you know what the date of this document was? What date it bore?
A. No, not exactly.
139 Q. When did you first see the document?
A. Oh, I may have seen it back as far as twelve or fourteen years ago.

Q. You may have?
A. Yes, sir.
Q. Have you any definite recollection about that?
A. That's been in our possession a long time and I have seen it at different times.
Q. Coming back now to this Gorge Property, there was at one time a dancing pavilion located on a part of the Millbank property was there not?
A. Yes, sir.
Q. That property was on the further side of the river?
A. The North side.
Q. And was pretty well towards the top of the bank of the river?
A. Perhaps half way.
Q. And that pavillion was constructed shortly after the property went into Mr. Everett's name was it not?
A. It was constructed during the time of the Akron Bedford and Cleveland Railroad Company's ownership.
Q. And not so very long after the asquisition of the property—taking the title in Mr. Everett's name, whatever the fact of ownership was?
A. No, I think not.
140 Q. It wasn't so very long after that?
A. No, I think not.
Q. That pavil*l*ion was used for amusement purposes?
A. It was intended for a dance pavilion.
Q. And it was maintained for a series of years in that relation?
A. Just a short time.
Q. Well for a number of seasons?
A. When I say that I mean by the company.
Q. For a number of seasons there was an orchestra at stated times in the week, once and twice a week?
A. I think the first year there was after we acquired the property.
Q. The company made the attempt to develop that into a resort did they not?
A. Well I think only to that extent.
Q. To that extent, and people did not come there so that after a season or two or three seasons it was abandoned, that is about the size of it?
A. Yes, sir, well as a resort it was not a profitable investment.
Q. And after a few seasons it was abandoned?
A. Well not any more so than it is now. It is thrown open to the public now just as then.
Q. There is no longer any orchestra there?
A. No.
Q. And dances were no longer held there?
141 A. In the last years we have leased the concession there to another party and he is at liberty to do as he pleases.
Q. What has he done with it?
A. He has had a little dancing there, and roller skating.

Q. And when that pavillion was built the idea was to develop a place of amusement or resort there?

Mr. Mather: You will allow me to interrupt, the pavillion is not within the limits of the property you are seeking to appropriate, and I think it's a waste of time.

The Court: Is it outside of the property you are attempting to appropriate?

Mr. Frank: We don't concede that.

Mr. Bacon: Yes.

The Court: Mr. Bacon says it is.

Mr. Frank:

Q. Do you know of any resolution or record of any kind in your possession, or the possession of your company, relating to the purchase of this property, at the time it was purchased from Mill Bank?

A. No, I do not know of any.

Q. Do you know of any resolution or record of the company——

Mr. Mather: What company?

Mr. Frank:

Q. The Northern Ohio Traction and Light Company, at the time this property was deeded by Mr. Everett to The Northern Realty Company?

A. I can't think of any now.

Q. You know of none, in fact?

142 A. No, off hand I don't know of any. I can't think of any.

Q. Are you able to state how much money was paid to Mr. Everett at the time of the delivery of the deed for the property to the Northern Realty Company?

A. How much was paid to Mr. Everett?

Q. Yes.

A.I don't think there was any paid to him.

Q. Do you know what in the way of property, stocks or bonds was transferred to him at the time of his conveyance to the Northern Realty Company?

A. No, I do not.

Q. Is there any record of the company on the subject?

A. Not that I know of.

The Court: Were you connected with the Northern Realty Company?

A. Yes, sir.

Mr. Frank:

Q. Are you an officer of The Northern Realty Company?

A. Yes, sir.

Q. Did the traction company—you are vice president?

A. Of the Northern Realty Company, yes, sir.

Q. Did the traction company pay anybody any money, property, stocks or bonds at the time this deed for the gorge property was transferred to the Northern Realty Company?

A. No, I think not.

143 Q. Did the Northern Realty Company pay to any one, either to the traction company or Mr. Everett any money, property, bonds, stocks?

A. No, not that I know of.

Q. I call your attention to plaintiff's exhibit twenty-two, purporting to be the annual report of the Northern Ohio Traction and Light Company, for the year 1910, and to page ten of the same, to table A, and ask you what the item of $176,388.22 under the item of current assets, and The Northern Realty Company, represents?

Objected to.

Mr. Mather: I will go on the stand about this realty company and will answer those question-. I organized it.

The Court: You may answer.

Defendant excepts.

Mr. Frank:

Q. I am asking you what the item of $176,388.22 in table A, represents, opposite the name of the Northern Realty Company?

A. That represents money that's been expended for property and real estate.

Mr. Mather: By whom?

A. By the Northern Ohio Traction and Light Company.

Mr. Frank:

Q. What connection has that with the Northern Realty Company,—why is that put under the Northern Realty Company?

A. The Northern Realty Company was organized for the purpose of handling property that is not in daily operation in connection with the traction company.

144 Q. Then this sum represents money expended by the traction company on account of property that stands in the name of the realty company?

A. Yes, sir.

Q. And paid out by the traction company?

A. Yes, sir.

Q. You are not able I take it to state what items of payment make up this sum of money?

A. No, I am not off hand.

Q. Nor what properties are involved?

A. No. Various real estate transactions.

Q. Mr. Moore, referring to the record in volume one, at page 194, of the records of the Northern Ohio Traction and Light Company, under date of October 8th, 1906, with reference to the proposition of Willis Bacon, it was about that time and in connection with negotiations which Mr. Bacon had with your company that the suggestion of a water power plant in connection with the Gorge property first came up, was it not?

A. Well, the question came up at various times, but I think there was a little more said at that time than there had been prior to that.

Q. It was at about this time——

Mr. Mather: I object. We think the question is entirely incompetent. This suit wasn't begun until January 1911, and the
144½ plaintiff in this case wasnt' organized until that time. Now what is the difference what the Northern Ohio Traction Company did prior to 1906.

Mr. Frank: Why did you offer it?

Mr. Mather: I wanted to show Mr. Bacon knew it was the property of the Northern Ohio Traction and Light Company.

Mr. Frank:

Q. It was about this time was it not that—and not before this time that the matter of utilizing this property possibly for water power purposes was first thought of?

Mr. Mather: I object. He can't answer whether it was thought of by the corporation or not.

Objection overruled—defendant excepts.

A. It was at that time that our negotiations were on with Mr. Bacon.

Mr. Frank:

Q. You have no prior time—no record before this time on the subject of using this property for water power, have you?

A. Well—you mean——

Q. None in your record book?

A. I don't remember of anything prior to that.

Q. You haven't found anything prior to that?

A. Well, I haven't looked very much for anything prior to that.

145 Re-direct examination.

By Mr. Mather:

Q. You know as a matter of—or do you know as a matter of fact that the Northern Ohio Traction and Light Company, by its officers, had considered the development of the Gorge property long before this proposition was submitted by Mr. Bacon?

A. Yes, sir.

Objected to.

Judge Davis: We object on the ground that the action of the company must be proven by its records.

The Court: I don"t see why it makes any difference whether they did have any intention before that time or not. I will sustain the objection.

Thereupon the defendant for the purpose of further maintaining e issues upon its part to be maintained, offered as a witness, one, HARLES CURRIE who being duly sworn according to law testified follows:

Direct examination.

By Mr. Mather:

Q. Your name is Charles Currie?
A. Yes, sir.
Q. What position do you hold with the Northern Ohio Traction d Light Company?
A. Vice President and General Manager.
Q. How long have you been the vice president and general manager?
A. About twelve and a half years.
Q. Are you familiar with the entire property and system of the rthern Ohio Traction and Light Company?
A. Yes, sir.
Q. What business is it engaged in?
The Court: Let us agree. We all know that.
Mr. Mather: I want it in the record.
A. In the traction, light, and power business.

Mr. Mather:

Q. Describe its railway system as to extent and locality.
A. The system consists of 233 miles, and the interurban lines erate from Newburg Ohio to Urichsville, Ohio.
Q. Through what municipalities?
A. Through Cuyahoga, Summit, and Stark and Tuscarawas.
Q. That's the counties,—municipalities?
A. The village of Newburg, Bedford, Northfield, Macedonia, uyahoga Falls, City of Akron, village of Brittain, Greentown, New erlin, city of Canton, city of Massillon, village of Navarre, village Beech city, Justice, Canal Dover, village of New Philadelphia, llage of Urichsville. That's the extent of the interurban.
Q. Now what other interurban lines have you?
A. The interurban lines operating from Wadsworth Ohio to Ranna Ohio.
Q. Through what municipalities?
A. Village of Wadsworth, Barberton, Village of Kenmore, through the city of Akron, village of Cuyahoga Falls, the village of Kent, and Ravenna.
Q. What municipal street railways do you operate?
A. Operate lines in the city of Akron, City of Canton, City of assillon.
Q. And what other business besides that of transportation is the mpany engaged in?
A. In the light and power business.
Q. What is the extent of its distribution for light and power, over hat territory?

A. We operate the lighting system of the city of Akron, and the city of Barberton, the village of Uniontown, Greentown, the village of Mogador, Hartville, Congress Lake, and Kenmore.

Q. In what municipalities do you do street lighting?

A. In the city of Akron.

Q. And do you do municipal lighting in all the other cities you have mentioned, that is supply municipal buildings?

A. In the villages.

Q. And likewise in the city of Akron? You light the municipal buildings in Akron as well as street lights?

A. Yes.

Q. What private lighting do you do?

A. The private lighting in Akron and Barberton and Mogador and Hartville and Congress Lake and Uniontown and Springfield center.

Q. What private contracts do you fulfill with respect to
148 furnishing electricity for power?

A. We furnish contracts to the large rubber companies of Akron, the Quaker Oats Company, The Goodrich Company, the Firestone Company —

Q. You mean the B. F. Goodrich Company?

A. The B. F. Goodrich Rubber Company, The Firestone Rubber Company, the Miller Rubber Company, the Buckeye Rubber Co., the Portage Rubber Co., The Goodyear Rubber Co., The Quaker Oats Co. Those are the large ones I can remember.

Q. I presume you don't personally know the percentage of electric energy used by these companies produced at the Gorge Power Plant?

A. Not off hand.

Q. What do you know as general manager and vice president of the company, to your personal knowledge, as to what has been done with respect to the Gorge, or Millbank property since you have been vice president and general manager, prior to January 20, 1911?

A. We have built a power plant, steam power plant, and a hydro plant.

Mr. Mather: Now I withdraw that question as to prior to January 20th, 1911, and leave it as it is. I just withdraw the question.

Q. What has been done by the Northern Ohio Traction and Light Company, with the Gorge Property, since it was acquired by Mr. Henry A. Everett from Millbanks with this property?

149 Objected to.

The Court: Up to this time?

Mr. Mather: Yes. We claim we had begun the development of this property prior to the time the suit was begun, and had a right of course to complete it. Question withdrawn.

Q. State to your knowledge, what the Northern Ohio Traction and Light Company has done with respect to the Gorge Property from the time it was acquired in 1897 by Henry A. Everett up to January 20, 1911, the date this petition was filed?

Objected to.

Objection overruled.
Plaintiff excepts.

A. We have constructed a steam power plant —
Q. No, that's since January 20th.
A. Well, we had commenced the building of a plant prior to that ime, of a steam plant.
Judge Davis: In January 1911?
A. Yes, sir, prior to that.

Mr. Mather:

Q. Do you know whether any contracts had been let for construc- ion and clearing the ground?
A. Yes, sir, engineers were engaged, and so forth.
Q. Your records will show that?
A. Yes, sir.
Q. What has been done since that time?
A. We have constructed a steam plant and a hydro electric plant.

Mr. Frank: I want an objection and exceptions to that.
The Court: I think I will let that go in.
150 Plaintiff excepts.

A. And built a dam across the river, sixty foot dam.

Mr. Mather:

Q. Sixty feet high you mean?
A. Sixty feet high.
Q. Are you familiar with the property described in the plaintiff"s petition in this case?
A. Yes, sir.
The Court: When was that dam built?
A. About a year and a half ago, completed.
Q. When was it started?
A. It was started about, just about a year ago.
Q. When did you start to build the dam?
A. The dam was started I should say about two years ago,—over two years ago.

Mr. Mather:

Q. Does the Northern Ohio Traction and Light Company utilize the power generated by the steam and hydro electric power plants, on what is known as the Gorge property for transportation purposes, and for furnishing electricity for light and power purposes?

Mr. Frank: Read the question.
(Thereupon the question was read by the stenographer as follows:

"Does the Northern Ohio Traction and Light Company utilize the power generated by the steam and hydro electric power plants on what is known as the Gorge property for transportation purposes, and for furnishing electricity for light and power purposes?")

The Court: Go ahead, you may have your exception.

151 A. Yes, sir.

Cross-examination.

By Mr. Frank:

Q. Prior to January 1911 nothing had been done in the way of construction on this property except to employ engineers?

A. Well an engineer, and a force of men were started into work under his direction.

Q. What work was done prior to January 20, 1911?

A. We had started the foundations, and had cleared,—had done grubbing, as you call it,—the clearing for our transmission lines.

Q. At what place?

A. That was from the present steam power plant West for approximately about a mile or mile and a half.

Q. Who did that work?

A. Mr. W. E. Davis, under the direction of Mr. W. E. Davis, the engineer.

Q. Who actually did the work?

A. Mr. Fred Little was the man in charge of the gang of men.

Q. Was that work let out to a contractor?

A. No, sir, this was under the direction of the Northern Ohio Traction and Light Company. Mr. Davis was hired as our engineer.

Q. What if anything did the Northern Ohio Power company do with reference to that?

A. The work was in the name of the Northern Ohio Power Company.

152 Q. All of the work of construction of that plant has been done in the name of the Northern Ohio Power Company, has it not?

A. Yes, sir.

Q. So far as the work has been let to contractors, all the contracts have been let in the name of that company?

A. Some, not all.

Q. You mean that some was not let out to contractors?

A. Some was let in the name of the Northern Ohio Power and some in the name of the Northern Ohio Traction and Light.

Q. Why did you split them?

A. I have forgotten just how that was, but I know some was taken in the name of the traction company and some the power company.

Q. But you don't know why the distinction was made?

A. No.

Q. That's all. Mr. Currie can you tell us exactly when that clearing was done that you say was done prior to December 20th?

A. I think as far as I know that was commenced in December 1910.

Q. In December 1910?

A. Yes, I think that's when the work was started.

Q. That was clearing for a power line?

153 A. Clearing for the foundations, and the power line.

Mr. Mather:

Q. Foundations for the steam power plant?
A. Yes, sir, foundations for the steam power plant.

Mr. Frank:

Q. Mr. Davis had charge of this work you say as engineer?
A. Yes, sir.
Q. And how long prior to this time this work was started had Mr. Davis been employed by the company?

Mr. Mather: I object. The record of the directors has already been introduced employing him.

Mr. Frank: I am asking how long prior to the commencement of this work had Mr. Davis been employed.

Objected to.

The Court: Do you know when they employed Mr. Davis?
A. I think it was December, 1910, but the record shows.

Mr. Frank:

Q. And it was after Mr. Davis was employed that this work you speak of was done?
A. Yes, sir.
Q. By whom was Mr. Davis employed, by what company?

Mr. Mather: Object.

Mr. Frank: His employment was for the Northern Ohio Traction and Light Company.

Mr. Mather: We admit that.

A. The record shows he was employed by the Northern Ohio Traction and Light Company.

54 Mr. Frank:

Q. And not otherwise that you know of?
A. I couldn't answer that.

Thereupon the defendant for the purpose of further maintaining the issues upon its part to be maintained, offered as a witness E. D. ECKRODE, who being first duly sworn according to law testified as follows:

Direct examination.

By Mr. Mather:

Q. Your name is E. D. Eckrode?
A. Yes, sir.
Q. And what position do you have with the Northern Ohio Traction and Light Company?
A. Engineer of Way.
Q. And how long have you been associated with the company as engineer?
A. A number of years.

Q. Are you familiar with what is known as the Millbank or Gorg Property?

A. Yes, sir.

Q. Are you familiar with the property described in the plaintiff petition in this proceeding?

A. Yes, sir.

Q. How long have you been familiar with it?

155 A. Quite—the Gorge property I have been familiar wit that for fifteen or eighteen years.

Q. Are you familiar with the property described in the Bi Cuyahoga River Light Heat and Power Company's petition filed i the Probate Court of this county against Taylor Vaughn and Tayl and others?

A. I have seen a copy of it.

Q. I hand you here a paper marked Defendant's Exhibit J, an ask you to examine it, and say what it is?

A. It shows a map, known as the Millbank property, and pro erty adjacent and abutting on the river. Also showing the cour of the river through this property, and yellow lines, which tend t show lines 100 feet each side of the river center line.

(Said Exhibit is hereto attached, at page —, marked: Defen ant's Exhibit J and made a part hereof.)

Q. What do the two yellow lines on the North and South side the river, and parallel, or meant to be parallel with the center of th stream indicate?

A. Indicate the boundary lines of land proposed to be appropr ated by the plaintiff company.

Q. Is that a correct measurement according to the scale of th map or put in only as approximate?

A. It's only approximate.

Q. That is the two yellow lines?

A. Yes, the other is to scale.

Q. All the rest of the print on the map is to scale?

156 A. Yes, sir.

Q. And to scale as shown on the corner of the blue print

A. Yes, sir.

Q. Is there any point on this exhibit where the two yellow lin leave the center of the stream a distance of more than one hundre feet?

A. Yes, sir.

Q. At what point is that?

A. It's what is known as the—I have forgotten——

Q. At what point is it indicated on this exhibit?

A. It's on the Portage Township line.

Q. And it's marked Portage Township line on one side and Tal madge tract on the other, on the exhibit?

A. Yes, sir.

Q. I call your attention to a triangular strip as shown on thi exhibit, having within the three sides the figures 107, and immed ately after the figures 107, the word a-c-r-e-s, with the 90° angle i

the center of the stream, and the perpendicular of the angle, where it intersects the hypotenuse at the apex of the angle, having at this point the figures 450, and with the base of the triangle extending East to the point where it again intersects the yellow line, marked as a boundary, and at which point the figures,—what is that?

A. 803.

157 Q. —803 are found, and ask you to state, if you know whether that triangular strip of land is contained in the description of the premises described in plaintiff's petition in this case?

Objected to.

The Court: If you know you may answer.

Plaintiff excepts.

A. It is.

Mr. Mather:

Q. Do you know who owns that?

Objected to—objection overruled—plaintiff excepts.

A. It stands on record in the name of the Akron Bedford and Cleveland Railroad.

Q. Does the Northern Realty Company own it or any part of it?

Objected to—plaintiff excepts.

A. No, sir.

The Court: Strike that out.

Mr. Mather:

Q. Are you familiar with the location of the Northern Ohio Traction and Light Company's steam plant, on what is known as the Gorge property?

A. In a general way, yes. It is located East of what is known as our Gorge Bridge, where the railway tracks cross the river on the bank of the river.

Q. Is it close to the water's edge?

A. It is.

Q. Could you say definitely whether or not the power house structure itself is included within the limits of the property

158 described in plaintiff's petition in this case?

Objected to—objection overruled—plaintiff excepts.

A. The steam plant at the present time is located directly on the water's edge as it is at the present time, and on the edge of the slope or bank as it was before the dam was erected.

Q. What would you say as to whether it was 100 feet distant or more from the old middle line of the stream, and as the stream existed on January 20th, 1911?

Objected to—objection overruled—plaintiff excepts.

A. I can't give you the exact distance of that there.

Q. What is your judgment?

Mr. Frank: I object to a guess on it.
The Court: Give your best judgment from your knowledge the facts?

A. I should judge it wasn't over one hundred feet at the mo

Mr. Mather:

Q. And what structures, if any, are built from the power pla into the stream?

Objected to—objection overruled—plaintiff excepts.
Question withdrawn.

Q. Going back to exhibit J, you say this blue print outside of t things indicated by the parallel yellow lines is correct?
A. Yes, sir, to the best of my knowledge.
Q. Do you say it is as correct as it can be made from the d scription of that property, the record description?
A. I do.

159 Cross-examination.

By Mr. Frank:

Q. Mr. Eckrode, will you get to the start of the description—yo have examined the description in the petition have you not?
A. In a general way.
Q. Where does—point out in your map at what point the d scription starts?
A. Well, I am not familiar enough with that without reading tha over. I have not seen that for a long time.

Mr. Frank: I want to see your record number two, page 161, an page 183, 194,—that's in the other volume.
Mr. Mather: 161 and there is the other page.
Mr. Mather: I offer in evidence the deed of George Sackett Trus tee to The Akron Bedford and Cleveland Railroad Company, recorde in volume 235, page 242 of the Summit County Records of Deeds It may be marked defendant's exhibit K.

(A true copy of said deed is hereto attached at page- 204-20 marked: Defendant's Exhibit K, and made a part hereof.)

Mr. Frank: Object.
The Court: It may be admitted.
Plaintiff excepts.

160 Thereupon the Defendant for the purpose of further maintaining the issues upon its part to be maintained, offered as a witness, CHARLES H. LAHR, who being duly sworn according to law testified as follows:

Direct examination.

By Mr. Mather:

Q. Your name is Charles H. Lahr?
A. Yes, sir.
Q. What position do you hold with the Northern Ohio Traction and Light Company?
A. Auditor.
Q. How long have you been auditor of that company?
A. Six or seven years.
Q. As auditor of that company what are your duties?
A. Looking after the expenditures.
Q. You have charge of the books of account of the company?
A. Yes, sir.
Q. And all of the vouchers?
A. Yes, sir.
Q. And things relating to contracts and expenditures?
A. Yes, sir.
Q. Are you familiar with the Gorge property, the property described in plaintiff's petition in this proceeding?
161 A. Yes, sir.
Q. What document—have you examined the books of the company having reference to any payments made with respect to the Gorge property?
A. Yes,
Q. Prior to January 20th, 1911?
A. Yes, sir.
Q. And what payments did you find?
A. I found one in May, 1910 to Sargant and Lundy, engineers, for $750.
Q. Are those the engineers that submitted a report on the hydraulic possibilities of that property?
A. Yes, sir.
Q. What others?
A. December 1910, for material from the W and B Company, Cleveland for $7.00.
Q. What was that for if you know?
A. Hardware used in starting to clear up the Gorge property.
Q. What other expenditures?
A. We have pay-rolls.
Q. What do those show?
A. Well there were expenditures for pay-rolls during the months of December——
Q. What year?
A. 1910.
Q. What do they show?

A. $142.60.

Q. Your entire expenditures during 1910 for the Northern
132 Ohio Traction and Light Company amounted to how much?

A. Something over $1500.00.

Q. On that particular property?

A. Yes, sir.

Q. What did you find with respect to taxes on the property?

A. They have been paid from time to time.

Q. By what company?

A. The Northern Ohio Traction and Light Company.

Q. Now Mr. Lahr, state whether or not the Northern Ohio Traction and Light Company also pays in addition to taxes on the land, and has paid in the past taxes on water power there?

Objected to.

Q. Have you any documentary evidence of any sort or character Mr Lahr in your possession that would show who paid taxes on any of the Gorge property?

A. Not in my possession here.

Q. Do you have them in your office?

A. Yes, sir.

Q. Can you produce them?

A. Yes, sir.

Q. What is the nature of them?

A. Just the regular tax receipts.

Mr. Mather: Do you want those brought up.

Mr. Frank: Bring in your tax receipts instead of your testimony and we will let them go in.

Mr. Mather: We will offer this with the understanding
163 that we will introduce the tax receipts.

The Court: All right.

Mr. Mather:

Q. What did you say, the taxes were paid by the Northern Ohio Traction and Light Company?

Objected to—objection overruled—plaintiff excepts.

A. Yes.

Q. Now Mr. Lahr, what expenditures, if any, have been made by the Northern Ohio Traction and Light Company in the aggregate in the development of the Gorge property for power purposes, both as to steam and hydroelectric plants, and all appurtenances?

Objected to.

Mr. Frank: I wish to direct the attention of the court to a question which was raised by the stenographer. The court has said we might have our objection and exception to all of this line of testimony, but the stenographer says that without your specific direction he won't put in the respective objections after the questions.

The Court: Give them an objection and exception to all this line of examination.

Stenographer: Insert it in the record?
The Court: Yes to this line of examination with reference to what has been done since the petition has been filed in the case.
Mr. Frank: And the ownership of this property by the traction company?
The Court: Yes, you may have your exception to that too.

Mr. Mather:

Q. What do you say Mr. Lahr?

Objected to—objection overruled—plaintiff excepts.

164 A. The expenditures up to January 1, 1914, was $1,979,549.68.

Q. That included only the development of the property?

Objected to—objection overruled—plaintiff excepts.

A. That included the power station.
Q. Both power houses?

Objected to—objection overruled—plaintiff excepts.

A. Yes.
Q. And the dam?

Objected to—objection overruled—plaintiff excepts.

A. Yes.
Q. And the flume?

Objected to—objection overruled—plaintiff excepts.

A. Yes, everything.
Q. Does it include transmission lines?

Objected to—objection overruled—plaintiff excepts.

A. Yes, sir, and sub stations.
Q. Mr. Lahr, I hand you two documents, one marked Defendant's Exhibit L, and the other Defendant's Exhibit L-one, and ask you to examine them and state if you know what they are?

(Said exhibits are hereto attached at page- 246-254, marked: Defendant's Exhibit L, and Defendant's Exhibit L-one, respectively, and made a part hereof.)

A. This one here is a report on the water power.
Q. To whom?
A. To George Paul.
Q. Was Mr. George Paul at that time chief engineer of The Akron Bedford and Cleveland Railroad?
A. Yes, sir.

Q. When was this dated?
165 A. November 24, 1897.

Q. That's a hydraulic engineer's report about the time or soon after they acquired the property of Millbanks — and what is this, do you know?

A. I don't know unless it would be a plat of the property.
Q. I think that's all.

Cross-examination.

By Mr. Frank:

Q. The amount of expenditures which you gave us as one million, nine hundred and some odd thousand dollars as having been made up to January 1, 1914?
A. Yes, sir.
Q. Were those expenditures made on your books in the name of the Northern Ohio Power Company?
A. Yes, sir.
Q. Are you in possession of the books of the Northern Ohio Power Company?
A. Well, yes, I have them in my possession what books they have.
Q. From what date on did you make entries of expenditures on this property in the name of the Northern Ohio Power Company?
A. Well that started in 1910.
Q. What was the amount of the expenditures charged up against this property prior to the time when entries were made in the name of The Northern Ohio Power Company?
A. Prior to entries——
166 Q. Yes, have you any expenditures charged up to this property excepting the ones in the name of the Northern Ohio Power Company?
A. The only one I can recollect of is the one of $1500 charged up to the first of January 1911.
Q. Was that in the name of the Northern Ohio Power Company?
A. Yes, sir.
Q. And all after that were made in the name of the Northern Ohio Power Company?
A. Yes, sir.
Q. Contracts for the various items which made up this total which you have given were in the name of the Northern Ohio Power Company were they not?
A. Not all of them. Some of them.
Q. But the payments were all made in the name of that company?
A. Payments were made by the Northern Ohio Traction and Light Company.
Q. You said they were made in the name of the Northern Ohio Power Company did you not?
A. There was a Northern Ohio Power Company, but the Northern Ohio Traction and Light Company advanced the money for it.
Q. And the Northern Ohio Power Company made the expenditures, that is, it shows that way on your books?
A. Yes, sir.

Mr. Mather: The Northern Ohio Power Company never expended a dollar on it.

Mr. Frank:

Q. What did you get in the way of money, notes or bonds from the Northern Ohio Power Company.

67 A. We had none.

Q. Was it simply an open account against the Northern Ohio Power Company?

A. It was an open account on the Northern Ohio Traction and Light Company books.

Q. A charge against the Northern Ohio Power Company?

A. The expenditures made by the Northern Ohio Traction and Light Company were charged against the Northern Ohio Power Company.

Q. Do you know how much of an issue of stock there was of the Northern Ohio Power Company?

A. I do not.

Q. Do you know who holds the stock of that company?

A. No, sir.

Q. Do you know anything about its issue of bonds or stocks in any way?

A. No, sir.

Q. The items of expenditure which you have given us of $759, $70, and $142.60, do you have the vouchers for those here?

A. Not here, no sir.

Q. What did you have here?

A. Just a memoranda.

Q. Will you — have you the vouchers for those showing what the expenditures were for?

A. Yes, sir.

168 Q. Will you produce those for us?

A. Certainly.

Mr. Mather: They are no more competent than the book account. If he wants the ledger account he can have that, but the vouchers would be very voluminous.

Mr. Frank: Not for the three items.

Mr. Frank:

Q. You give its aggregate at $1500, this $750 and $7- and $142.60 were a part of that?

A. Yes, sir.

Q. Will you produce the items making up that $1500?

A. Yes, sir.

Q. Now I am not sure; that aggregate of $1500, when with reference to say December 31st, 1910 were those expenditures made?

A. They were made during 1910.

Q. And during the month of December?

A. Yes, sir, some in December.

Q. What part of it was made during December?

A. I can't tell from what I have here now.

Q. You have no memoranda that enables you to tell?

A. Not all of them.

Q. How about this item of $750, what was that item of $750?
A. That was an engineer's report on the water.
Q. Was that made in December 1910?
A. That was paid in May 1910.
Q. And the item of $70 to the W. & B. Co., was *was* that
169 W. Bingam & Co.?
A. Yes, sir. That was $7.00.
Q. What was that for?
A. Hardware.
Q. What sort of Hardware?
A. I think some saws or something.

Mr. Mather: To cut down timber?

Mr. Frank:

Q. And the item of $142.60, that was a pay-roll?
A. Yes, sir.
Mr. Frank: That's all.

Mr. Frank:

Q. Mr. Lahr, aside from the power house, prior to the construction of the power house now located at the Gorge, the Northern Ohio Traction and Light Company had a power house on Beech street in the city of Akron?
A. Yes, sir.
Q. And secured its power for the company, and lighting and power and other purposes from that plant?
A. Yes, sir.
Q. So far as the city of Akron was concerned?
A. Yes, sir.
Q. The company also had a power house near Bedford?
A. In Bedford.
Q. And still has?
A. A sub station now.
Q. And there also was a power plant at Cuyahoga Falls?
A. Silver Lake Junction.
170 Q. That's still there?
A. It's a substation now.
Q. And what other power houses were there prior to the construction of this plant operated by the traction company?
A. One in Canton.
Q. And one near Massillon?
A. A substation in Massillon, that's all.
Q. Do I understand there were no others then than you have named?
A. That's all, only substations.

Redirect examination.

By Mr. Mather:

Q. Did you mean to say in answer to Mr. Frank's question that

the Northern Ohio Power Company had paid any part of the expenses in the development of the Gorge property?

A. It was all paid by the Northern Ohio Traction and Light Company.

Q. And it was not paid to the Northern Ohio Power Company, but paid direct to the persons to whom the money was due?

A. Yes, sir.

171 Thereupon the defendant for the purpose of further maintaining the issues upon its part to be maintained, offered as a witness, W. H. ROBERTS who being first duly sworn according to law, testified as follows:

Direct examination.

By Mr. Mather:

Q. What is your full name Mr. Roberts?

A. W. H. Roberts.

Q. And what is your occupation?

A. Superintendent of Motive Power for the Northern Ohio Traction and Light Company.

Q. How long have you been in that capacity?

A. About seven years. Before that four years as Master Mechanic.

Q. You have been with the Northern Ohio Traction Company eleven years?

A. Yes, sir.

Q. What experience have you had with electric railway companies and electricity for companies prior to your relationship with the Northern Ohio Traction and Light Company?

A. I was in the employ of the Toronto Railway Company as a Master Mechanic and electrical expert for seven years. Prior to that I was in my own business as The Robert's Storage Battery and Construction Company in Toronto, and seven years before that I was head machinist at the Vauxhall Iron Works in England, and three years with the Maxim Gun Company.

172 Q. Are you familiar with the so called Gorge property, and the property sought to be appropriated in this action?

A. Very well.

Q. How long have you been acquainted with it?

A. Since my connection with the company.

Q. Eleven years ago?

A. Yes, sir.

Q. Do you know the location of the steam power plant at the Gorge?

Objected to—objection overruled—plaintiff excepts.

A. Yes, sir.

Q. And of the hydroelectric plant-

Objected to—objection overruled—plaintiff excepts.

A. Yes, sir.
Q. And of the dam?

Objected to—objection overruled—plaintiff excepts.

A. Yes, sir.
Q. And of the flume?

Objected to—objection overruled—plaintiff excepts.

A. Yes, sir.
Q. Are you acquainted with the entire development that has been made of the water power in that locality?

Objected to—objection overruled—plaintiff excepts.

A. I think so.
Q. You may describe Mr. Roberts the character of the development that has been made by the Northern Ohio Traction and Light Company of the water power and steam power for electrical purposes in connection with the Gorge property?

Objected to—objection overruled—plaintiff excepts.

Mr. Mather: Tell it so the stenographer can understand it, and get it into the record.

173 A. The development for the steam plant was commenced about December 1910. I made a report on the situation as to the character of the property for obtaining water and coal, which is the two principal matters to consider, some seven months before that.

Q. To whom had you made the report?
A. To a number of the stockholders in Cleveland. That report was passed on by Sargent and Lundy.

Objected to.

Q. Did you submit it to the officers of the Northern Ohio Traction and Light Company after you finished it?
A. Yes, sir.
Q. Tell the nature of this development and the character of the steam plant and the capacity and all about it.

Objected to—objection overruled—plaintiff excepts.

A. The work was commenced about December 1910, and foundations placed on the portion of the ground to the east of what is now known as the Gorge Bridge. The buildings there occupy a space 150 by 330 feet. The turbine room is 270 by 64. We have in connection with that at an elevation of ninety feet a track that runs directly in connection with the main line of the Pennsylvania Railroad Company. We constructed there coal bins which contain 6700 tons, and beneath that, bins that run directly into the feeders of the boilers, that contain 450 tons. That is fed directly to the boiler room, which is 90 feet below the level of the steam road tracks.

In that boiler room we have sixteen, 600 horsepower B & W
74 Boilers, that are operated by forced draft by Taylor Stokers.
These boilers supply steam to three, 6300 K. W. Steam Turbines.
hese in turn supply power at six—at 2300 volts, which is stepped
p to 22000 volts, and transmitted from the power house.
In connection with the Steam Turbines we have Leblanc Con-
ensers, jet type, that take in water from the cold water well, 32
et below the level of the power house. That line is longitudinal
2 feet from same level, and the high level of the water is 914
et. The level of the Turbine floor is 918 feet. That water is
ken in a cold well, passes through screens and the condensers
aw water into the condensers cold under the turbines, and then
e water passes from there into a hot well. From the hot well
e water is pumped into heaters. These heaters supply water
rough turbine driven feed pumps to the boilers.
We have in connection with the power house a low tension
rvice for railway operation. Three 500 K. W. Turbines, and
en our power is transmitted on duplicate high tension lines.
One high tension line runs down by what is known as the Gorge
ute, and passes through our property, and passes the hydro
ectric plant, and then turns in the direction South to Akron, and
mes in at Beech street close to the old power house.
The other transmission line goes over what we call the North Hill
Route, and then comes directly into sub station 4, that is
5 our distributing station in Akron, where we distribute for
this district for light and power.
There is a familiar transmission of 22000 volts running to our
b-station at Kenmore. That is also a distributing center for power
d light. The lines that lead out to Barberton operate our Barber-
n division for power and light. Also for supplying our railway
rvice. And then we have a 22000 transmission line that branches
t close to the dam and goes over in the direction of Cuyahoga
lls, and is there branched over to Kent, where we have a sub-
tion for operating the Kent and Ravenna division. We have
other high tension, or the main high tension line that runs
rough Macedonia and our right of way to Bedford where we have
otary station. We have also a rotary station at Macedonia. So
t we transmit our power to Bedford and Macedonia and Silver
ke Junction for operating on the A. B. C. and also a station out
Kent for operating on the Kent and Ravenna division, and the
tion at Kenmore and Barberton operates the Barberton and Wads-
rth division.
Q. Have you described all of the distribution features of this
nt?
A. No, sir. We have a high tension—

Objected to—objection overruled—plaintiff excepts.

A. Underground cable. We have high tension distributing cables
different parts of the city. For instance to the Goodyear plant,
d the Goodrich plant, and to the Firestone. And we have a

lower tension of 4000 and 100 volts for the transmission of ligh and power over the entire district.

Q. Over what district?

176 A. The district covered by the railroad and the lighting systems and for instance such outlying districts as Barberton Hudson and Cuyahoga Falls and Kenmore and other places, tha we call the Southern division of the line.

Q. What amount of water is used from the reservoir at the gorg property for condensation purposes for this power plant?

Objected to—objection overruled—plaintiff excepts.

A. We used about 1000 gallons a minute. You mean for con densation in the condensers?

Q. Yes?

A. At the present we use in the condensing system, in full opera tion, about 30,000 gallons an hour, 30,000 gallons a minute in addi tion to the 1000.

Q. What?

A. 30,000 gallons per minute, on our peak load.

Q. And that's for condensation?

A. Yes, and 1000 for evaporation.

Q. Are you acquainted with the hydro electric plant located on this property and on the property the plaintiff seeks to appropriate?

A. Yes, sir.

Q. Describe that.

Objected to—objection overruled—plaintiff excepts.

A. We have it down about 2000 feet from the power house.

Q. From which power house?

A. The Gorge power house.

Q. The steam or hydro electric?

177 A. From the steam plant down to the dam is about 2000 feet.

Q. And how far is it from there to the hydro electric?

A. 2760 feet.

Q. And how high is the dam?

A. The dam head is 52 feet.

Q. And you have a water head of what?

A. 54 feet on the pipe line.

Q. And a total head of how many feet?

A. 160—106 feet, with a net head of 100 feet.

Q. That's from the intake to the hydro electric plant?

A. Yes, sir.

Q. Describe the hydro electric plant, which you say is located 2700 feet West of the dam?

A. We have in there three—

Objected to—objection overruled—plaintiff excepts.

A. We have in there three water driven turbines, American Type, driving three 600 K. W. electric generators. They are operated in connection with steps, or transformers, that step up to 22000 volts, feeding directly into our high tension lines.

Q. What is the capacity of that hydro electric plant?
A. 2757 horse power.
Q. Does that run constantly, day and night?
A. Yes, sir.
Q. And entirely by water power?
A. Yes, sir.
78 Q. How large a flume do you have constructed from the dam to the hydro electric palnt?
A. 90 inches.
Q. Seven feet and a half?
A. Yes, sir.
Q. Inside measurement?
A. Yes, sir.
Q. Does that run full of water?
A. Yes, sir.
Q. Is all of that water utilized in the production of electricity at ie hydroelectric plant?
A. Yes, sir.
Q. All goes through the three turbines?
A. Yes, sir.
Q. Describe the construction of this dam and tell where it is cated?
A. The dam is located about 2000 feet from the steam plant, about 2 feet high, with a spill-way of about 120 feet. I don't know what irection it is in.
Q. It's between the steam plant and the hydro electric?
A. Yes. We have a valve that is electrically controlled down at ie hydro electric plant controlling the water that comes from love at the dam to supply power to the hydro plant.
Q. Tell us what kind of a reservoir as to size is created?
A. Probably 35 acres.
Q. And what is the depth?
79 A. The depth at the intake at the power house is 36 feet.
Q. And what is it near the dam?
A. I couldn't say.
Q. How high is the dam?
A. 52 feet.
Q. The water is as deep as the dam is high?
A. Practically.
Q. About 52 feet?
A. A few feet different.
Q. How far geographically speaking does the dam back the ater up,—it reaches to what point?
A. It reaches up to the old bridge east of—above the Gorge power ant.
Q. That's near the village of Cuyahoga Falls?
A. Near the village.
Q. It's inside the corporate limits of the village?
A. I don't know.
Q. And how long is it?
A. What?

Q. The reservoir?
A. Well I should think about 4000 feet.
Q. And contains about thirty five acres?
A. 35 acres.

The Court:

Q. What horsepower did you say the steam plant—what capacity is it?

A. We have a normal capacity of 31,000 horse power.
180 Q. And the hydro electric has 2700?
A. 2750.

Mr. Mather:

Q. What is the maximum capacity of the steam plant when fully developed?
A. About 83,000 horse power.
Q. Would it be possible to operate the hydro electric or steam plant if the property described in this petition were appropriated by the plaintiff?

Objected to—objection overruled—plaintiff excepts.

A. If we operated without the water?
Q. Yes.
A. No, sir.
Q. You spoke of a deep water well, in or about the steam plant, is that fed by water from the river created by this dam?
A. Yes, sir.
Q. And entirely fed by that?
A. Absolutely.
Q. Now Mr. Roberts, what do you say as to whether the hydro electric plant is so constructed that it can use, and does use the maximum flow of the Cuyahoga River at its ordinary stage?

Objected to—objection overruled—plaintiff excepts.

A. We are using that with a very little overflow occasionally.
Q. That's in high water times?
A. Yes on occasion of any heavy rain or a flood.
Q. How much of the time during the year would that time be when you would not use the maximum flow of the river, giving your best judgment based on your experience there?
181 A. Well I anticipate that we will be able to operate from seven to eight months out of the year with the three machines in operation.
Q. How much of the time could you not use the maximum flow of the river, when the flow of the river would be more than the capacity of the hydro electric plant, when there would be more water than you could run down the flume in the three turbines? How much of the time when the flow of the river would exceed the capacity of that flume to the hydro plant? Would it be two months?
The Court: How much time would you have more water than you need?

A. We couldn't say. Our experience has only been in the winter
ıor ths.

Mr. Mather:

Q. When did you start the operation of this hydro electric plant?
A. About the second week in January.
Q. And you have been operating it ever since day and night?
A. Yes, sir.
The Court: Has it been working its full capacity?
A. On a very cold night—there is a tank on this pipe line——
Mr. Mather: We don't care about that. The flume has been carry-
ıg water from the dam down to the plant?
A. Except when we have been stopped by ice that has to be broken.
82 Q. What percentage of the entire power and electrical energy utilized by the Northern Ohio Traction and Light Company for light and power is generated at the power houses at the Gorge, if you know?
A. Well we generated last month about 2,350,000 Kilowat-s at the new steam plant and about 733,000 Kilowat-s at the Hydro plant.
Q. And what percentage is that?
A. About 20 per cent. Well that's about 20 per cent.
Q. You mean to say that you generated only 20 per cent of the electricity used by the company at those two power plants?
A. 20 per cent of the power generated last month was generated by the hydro plant.
Q. What percentage of the entire power used by the company, used over its entire system, was generated by the two plants, the steam and hydro, at the Gorge?
A. All the power used by the company was generated by the steam and hydro plants at the Gorge.
Q. Don't you operate a plant at Canton?
A. We have a plant, power plant at Canton.
Q. What percentage would you say that generated of the amount generated at the Gorge? What percentage does your Canton plant generate?
A. Of course you know there is no connection between the two. I would like to say—those at the Gorge 2,350,000—of course
83 it's difficult to remember these bunches of figures—2,350,000 generated at the steam and 733,000 at the Hydro plant,—about 20 per cent.
Q. Was that a total of a month's production?
A. That was last month's.
Q. February, 1914?
A. Yes, sir.
Q. Was any part of the power generated at the Canton power house utilized—you spoke of two divisions, the Northern and Southern divisions, what do you mean by that?
A. We go Southerly to Blue Pond.
Q. Easterly and Southerly to Blue Pond?
A. We call it South. It's to Blue Pond out East Market.

Q. And the Southern division covers from that point where?
A. From Blue Pond to Urichsville, I mean South from Blue Pond to Urichsville.
Q. And that is covered by the Canton Power House?
A. Yes, sir.
Q. Can the Canton Power House produce any more than is necessary for that branch of the system—can it furnish it?
A. Yes, we contemplate furnishing power from blue—that is from the Gorge Plant to Canton.
Q. You didn't understand my question—is the capacity of the power plant at Canton sufficient so that the power from that plant can be used by any other division?
A. There is no available power to be used on any other division.
184 Q. In other words you have the Canton plant up to its maximum?
A. Yes, sir.
Q. What percentage does the power use—or the power used on the Southern division bear to the power used on the Northern division—is it larger or smaller?
A. It would be about 25 per cent of the power that we generate on this division.
Q. You use three times the amount of power on the Northern division as you use on the Southern?
A. Yes, sir.
Q. Do you now say that all the power used on the Northern Divisions is generated at the power plant at the Gorge?
A. And the hydro plant.
Q. And you have no other power house in operation?
A. No, sir.
Q. What do you say as to whether or not this property, and the property described in plaintiff's petition is indispensible for the purpose and uses of the Northern Ohio Traction and Light Company and to which it is now put?

Objected to—objection overruled—plaintiff excepts.

A. It is indispensible.
Q. Could the Northern Ohio Traction and Light Company operate its transportation system, or fulfill its contracts with municipalities and with private concerns for light and power if it were de-
185 prived of this property?
A. No, sir.
Q. What part of the steam plant, if any, is built out into the stream?
A. Why, the intake for the—to the cold well is carried out to the stream, to the old bed, that is the stream that run down in the old bed, in the construction of the plant. That is about level with the old bed of the old stream, that is the lower level.
Q. Do you know where the old center line of the river was before the dam was built?
A. Approximately.

Q. Would you say that that portion of the steam plant was within one hundred feet of the center line of the river?

Mr. Frank: I object to any further cross examination on the river.

Mr. Mather:

Q. What would you say?

A. When we made the intake for the cold well we had to build a coffer-dam around the intake to put the foundation in.

Q. How far is the intake from the center of the river?

A. Only a few feet. We were in the stream.

Q. And how far from the structure of the steam power house?

A. The intake of the cold well?

Q. Yes?

A. About, it might be 18 to 20 feet.

Q. Has any change, to your knowledge been made in the
186 bed of the Cuyahoga River from the point where the dam was built by the Northern Ohio Traction and Light Company to the hydro electric plant?

A. No, sir.

Q. Where is this seven and a half foot flume with reference to the river bed?

A. It runs practically in line with the old river bed, and very close to it.

Q. And how far from the water's edge on an average?

A. Very close. I know when I walked the pipe line I noticed it.

Q. It's right along the water's edge?

A. Very near. It's very close to the water's edge.

Q. What was the character of the material—this is pretty far fetched perhaps,—question withdrawn—I want you to describe the character of the dam that was built in the Cuyahoga River briefly, just the kind of a dam that was built there?

Objected to.

The Court: I don't think that's material. The dam is there. I will sustain the objection.

Defendant excepts.

Mr. Mather: I want to show to the court these structures, both the dam and the hydro electric and steam power plants, so far as the structures are concerned, are substantially built and permanent.

The Court: I think that's a conclusion that can easily be drawn from what has gone before.

Defendant excepts.

187 Walker replaces Dewoody at 9 A. M. Saturday March 21s
1914.

Cuyahoga River Power Company vs. Northern Realty Company.

WILLIAM H. ROBERTS.

Cross-examination.

By Mr. Frank:

Q. Mr. Roberts your company doesnt furnish all of the power th
is used by The B. F. Goodrich Company does it?
A. No, sir.
Q. Does The B. F. Goodrich Company use the old power plant
Beech street for power?
A. No, sir.
Q. It doesn't?
A. No, sir.
Q. Do you also furnish power to The Quaker Oats Company?
A. Yes, sir.
Q. You do not furnish all of the power that that company uses?
A. No, sir.
Q. Do you furnish power to The Diamond Rubber Company?
A. No, sir.
Q. What other companies do you say you furnish power to?
A. We furnish power to The Wellman Seaver Morgan Company.
Q. Do you furnish all of their power?
A. No, sir.
Q. What other companies?
A. The Goodrich and The Goodyear. The Firestone.
Q. Do you furnish all of the power of the Goodrich and Goodyea
and Firestone?
A. No, sir. I might explain that we furnish the power they r
quire in excess—they are now enlarging their plants and we furnis
the power they need now. Their demands are always increas
188 ing, almost daily from these different plants. We furnish a
of the newspapers in Akron, The Akron Press, the Times an
The Beacon Journal, and The Wellman Seaver Morgan Company
The Quaker Oats and The International Harvester Company.
Q. The International Harvester Company, you do not furnish a
of their power?
A. No, sir.
Q. Do you The Beacon Journal and the Times?
A. We furnish all their demands.
Q. They run a few presses with your power?
A. Yes, sir.

Redirect examination.

By Mr. Mather:

Q. Do you furnish all the electric power used by these concerns?
A. No, sir.

Q. All of their electric power?
A. No, sir.
Q. They have some electric power of their own?
A. Yes, sir.
Q. What power plants does The Northern Ohio Traction & Light Company have in operation at present?
A. The Canton Power Plant and The — Power plant and The Hydro plant are the only plants we are now operating.
Q. Is the Beech street power house, The Cuyahoga Falls Power house and The Bedford power house abandoned?
A. Yes, sir, absolutely. The Urichsville power house is abandoned too. That is at the extreme south end of the southern division.

Recross-examination.

By Mr. Frank:

Q. When was The Beech street power house abandoned?
189 When you got your other power house into operation?
A. No. We still kept that, you see we transferred the power gradually, we couldn't shift at once from one power house to the other.
Q. Tell us when you started operating the new power house?
A. Twelve months last December is when we started getting things in operation.

The Court:

Q. Both the steam and the hydro plant?
A. No, sir, we commenced working the hydro this December.

Mr. Frank:

Q. Up until a year ago in December and since that time the Beech street power house and The Silver Lake junction power house were used for furnishing power for the company?
A. Well, occasionally. We had to use that intermittently in changing over the load.
Q. Before the new power house was in operation you got your power from the Beech street power house and your Silver Lake Junction power house and these various other power houses you have described?
A. About one third of the load we are carrying now.
Q. You got all of the power you used up to that time from these other power houses?
A. Yes, sir. But we hadn't contracted to serve these other people with power. And the street car service was not as great. We couldn't run our car service with Beech street now.
190 Q. Up to the time you started to use this power house you got all of your power that you used in these various power houses you have named?
A. Yes, sir.
Q. And your mileage at that time or your trackage at that time was what it is now?

A. Practically.

Q. Are you able to state Mr. Roberts whether your Hydro-electrical plant can be operated when your water gets to its low stage, say at fifty-two feet or thirty-two feet?

A. Yes, at fifty-two feet.

Q. How much power will your plant develop at the fifty-second foot stage?

A. About approximately one machine under load.

Q. How much is that?

A. 600 K. W.

Q. At the thirty-second foot flow could you operate it?

A. It wouldn't be worth while operating at that.

Q. How much will your hydro-electric plant yield in K. W. hours per year?

A. We get 48,000 K. W. in 24 hours, we get a little more than that but that entirely depends on the height of the water. If the water is a little above the sluiceways we get a little increase of power. But 48,000 in 24 hours is a fair average.

Q. Is that at the state of the water as it has been since you started to operate?

A. Yes, sir.

191 Q. And you have operated since December?

A. Yes, sir.

Q. And the stage of the water since December has been at the high stage or the normal stage?

A. Normal.

CHARLES H. LAHR, further direct examination.

By Mr. Mather:

Q. Mr. Lahr I hand you a number of papers which are attached by a bracket or clasp on the back of the outside one of which is marked Defendant's exhibit O, and I'll ask you to examine the several papers making up this exhibit and state what they are?

A. These are the taxes on the Gorge property.

Q. You mean the tax receipts.

A. The tax receipts for the years 1906, 1907, and 1908 paid by The Northern Ohio Traction & Light Company's' check.

Q. Is The Northern Ohio Traction & Light Company's check part of the exhibit?

A. Yes, it is part of the exhibit.

Q. That is dated when?

A. January 14th. 1909.

Q. How is it signed?

A. Signed by The Northern Ohio Traction & Light Company's officials, President and Treasurer.

Q. Signed by The Northern Ohio Traction & Light Company?

A. Yes, by its treasurer and president.

192 Q. J. R. Nutt, treasurer, and counter signed by Will Christy, president?

A. Yes, sir.

Q. Is that check in payment of the several vouchers and statements inside of that?
A. Yes, sir.
Q. How much is the amount?
A. $943.56.

The Court: Is that for this property described in the petition?
Mr. Mather: Yes, the tax receipts show that.

Q. I'll ask you if that is for the Gorge property?
A. Yes, sir.
Q. The part of it which is described in the plaintiff's petition?
A. Yes, sir.

A true copy of said exhibit is hereto next annexed and made a part hereof.

195 The Northern Ohio Traction & Light Co. No. 13732.

AKRON, OHIO, Jan. 13, 1909.

Pay to the order of Chas. Currie Gen'l Manager $943.56 Nine Hundred Forty three and 56/100 Dollars.

To The Central Savings & Trust Co., Akron, Ohio.

THE NORTHERN OHIO TRACTION & LIGHT CO.
J. R. NUTT, *Treasurer.*

Countersigned:

WILL CHRISTY,
V.-President.

196 DEFENDANT'S EX. O.

197 Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

No. 972

☞ PAY AT
TREASURER'S OFFICE

RECEIVED of _____, _____

For taxes on the following described property for the year 1913 08 in the Township of [illegible]

OWNER'S NAME	R	T	Tract	Lot	DESCRIPTION
Everett A Henry	11	2	2		N
	11	2	2		N of Riv
	10	2	1		W ½ W
	11	2	2		Old Mail
	11	2	2		
For Rate of Tax see other side					

☞ Examine this Receipt and see that all your Lands and Lots appear thereon as ~~Law forbids Official to state~~
~~Penalties on Delinquent Tax~~

Collector _____

JUNE, 1914 08

AY AT CASHIER'S WINDOW

R'S OFFICE, AKRON, SUMMIT COUNTY, OHIO

~~WM. H. KROEGER~~, Treasurer
S. S. Myers

dollars cents 08

1914

nship of PORTAGE

Books Open ~~April~~ Nov. 1 to ~~June~~ Dec. 20

DESCRIPTION	Acres	100	Value	Delinq. Tax ~~Dec.~~ 1913		Penalty		Special		~~Last Half~~ Tax 1913		Due ~~June~~ Dec. 20, 1914		Total Tax 1913 08	
				D	C	D	C	D	C	D	C	D	C	D	C
	30		1210	64	24					196	02	808	26		
River	6		480	25	11					7	77	25	88		
N.	40	34	1410	62	83					228	44	848	7		
Maids Kitchen	1	13	120	6	07					19	44	80	1		
	1	50	90	4	55					14	66	60	1		
												936	03		
Total															

When Tax is paid this bill must be receipted with Official Stamp of the Treasurer

193

~~WM. H. KROEGER~~, Treasurer
S. S. Myers.

cents 08

1914

Books Open Nov. 1 to June 20

alty	Special		~~Last~~ Half Tax 1913		Due ~~June~~ Dec. 20, 1914		Total Tax 1913 08	
C	D	C	D	C	D	C	D	C
			3	63				
			3	53				
				37				
			7	53				

When Tax is paid this bill must be receipted with Official Stamp of the Treasurer

194

233 Repairs customers' installation

Beach City

Bedford

" Portage School	.85
Northfield Village	.57
" Macedonia Village	.88
Norton	.70
" Wadsworth School	.68
" Coventry School	.61
" Western Star School	.62
" Western Star Village	.54
" Barberton School	.93
" Barberton City	1.14
Portage	.80
" Akron School	.86
Richfield	1.02
" Boston School	.66
" Hinkley School	1.04
Springfield	.84
" Suffield School	.65
" Akron School	.86
" Mogadore School	.96
" Mogadore Village	1.14
Stow	.82
" Monroe Falls School	.59
Tallmadge	.74
" Monroe Falls School	.58
Twinsburg	1.18
Akron	1.26

No. 1410

☞ PAY AT
TREASURER'S OFFIC

RECEIVED of _____, _____

For taxes on the following described property for the year 1913 in the Township of P

OWNER'S NAME	R	T	Tract	Lot	DESCRIPTI
Everett Henry	11	2	3	6	N
			2		Bet. river
			3	5	N. E.
For Rate of Tax see other side					

☞ Examine this Receipt and see that all your Lands and Lots appear thereon ~~as law forbids Official to abate Penalties on Delinquent Tax~~

Collector _____

JUNE, 1914 08

AY AT CASHIER'S WINDOW

~~WM. H. KROEGER~~, Treasurer
J. S. Myers.

t'S OFFICE, AKRON, SUMMIT COUNTY, OHIO

dollars cents 1914 08

nship of PORTAGE

Books Open ~~April~~ Nov 1 to June ~~20~~ Dec

DESCRIPTION	Acres	100	Value	Delinq. Tax Dec. 1913 ~~69~~		Penalty		Special		~~Last~~ Half Tax 1914 ~~25~~		Due ~~June~~ Dec 20, 1914 ~~25~~		Total Tax 1914 ~~94~~	
				D	C	D	C	D	C	D	C	D	C	D	C
	39	14	390							3	63				
River Tract	38	16	380							3	53				
	3	50	40								37				
										7	53				
Total															

tor

When Tax is paid this bill must be receipted with Official Stamp of the Treasurer

194

249 Law expense

Portage School

" Portage School	.85
" Portage School	.85
Northfield Village	.57
" Macedonia Village	.88
Norton	.70
" Wadsworth School	.68
" Coventry School	.61
" Western Star School	.62
" Western Star Village	.54
" Barberton School	.93
" Barberton City	1.14
Portage	.80
" Akron School	.86
Richfield	1.02
" Boston School	.66
" Hinkley School	1.04
Springfield	.84
" Suffield School	.65
" Akron School	.86
" Mogadore School	.96
" Mogadore Village	1.14
Stow	.82
" Monroe Falls School	.59
Tallmadge	.74
" Monroe Falls School	.58
Twinsburg	1.18
Akron	1.26

Form 5—5M—6-19-13—41637

No. 3278 $ 943.56

Summit County Treasurer

City

For Taxes

Month of January 1909

The Northern Ohio Traction and Light Company

MISCELLANEOUS

Expense Account			
Material on Hand, Cuyahoga Falls			
" " " Canton			
Electrical Supplies			
Taxes Accrued		943.	56
Defendant's Ex. O.			

RAILWAY

1 S. W d S.			
2 Ballast			
3 Ties			
4 Rails			
5 Rail F'st'ng & Joints			
6 Specia Work			
7 Underground con't'n			
8 R. and T. Labor			
9 Paving			
10 Misc. R. & T. exp.			
11 Cleaning & Sanding			
12 Remov, snow, ice, s'd			
13 Tunnels			
15 Bridg., tres, & culv			
16 Cross'gs, fence, signs			
17 Signal & in'tl'k'geys			
18 Tel. & telg. systems			
19 Other mis. way exp.			
20 Poles and fixtures			
21 Undergr'd conduits			
22 Transmission system			
23 Distribution system			
24 Misc. electric line exp.			
25 Buildings & structures			
26 Dep'c'n way & str's.			
27 Other operations, Dr.			
28 Other operations, Cr.			
29 Super. of equipment			
30 Power plant equip't			
31 Substation equipment			
32 [illegible]			

Brou.			
54 Mis. p'rp't sup. & ex.			
55 Sub st'n sup. and exp.			
56 Power purchased			
57 Power exch'n'd Bal.			
58 Other operations, Dr.			
59 Other operations, Cr.			
60 Pass. con., mot., tr'm			
61 Ft. & ex. " " "			
62 Mis. car service emp.			
63 Mis. car service exp.			
64 Station employees			
65 Station expenses			
66 Carhouse employees			
67 Carhouse expenses			
68 Op. sig'l int'rl'k'g sys			
69 Op. tel. & telg. sys.			
70 Ex. frt. coll'ns & deliv.			
71 Loss and damage			
72 Other transp'n exp.			
73 Sal. & ex. gen. of'rs.			
74 Sal. ex. gen. of cks.			
75 Gen. of Sup. & ex			
76 Law expenses			
77 Relief D[illegible]t. exp.			
78 Pensions			
79 Mis. general exp.			
80 Other operations, Dr.			
81 Other operations, Cr.			
82 Injuries and damages			

Brought.....

TRANSMISSION

209 Sub station wages.....
210 Maint. trans. lines.....
211 Sub station sup. & exp.....
212 Maintaining sub station buildings.....
213 " " " equipment.....

STORAGE BATTERY

214 Wages.....
215 Supplies.....
216 Battery repairs.....
217 " accessories.....

DISTRIBUTION

218 Wages.....
219 Supplies and expenses.....
220 Set's and rem. meters and transformers.....
221 Underground conduits.....
222 Overhead dis. lines.....
223 Underground dis. lines.....
224 Services.....
225 Transformers.....
226 Meters.....

UTILIZATION

227 Commercial arc installation.....
228 Inspection customers' premises.....
229 Municipal arc installation.....
230 " incandescent installation.....
231 Commercial arc repairs.....
232 " incandescent renewals.....
233 Repairs customers' installation.....

Brought.....

25 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Ravenna.....
" Barberton.....
" A.....
" B.....
" Beach City.....
" Canton.....
" High St.....
" Midvale.....
" Macedonia.....
" Gorge.....
" Kenmore Barn.....
30 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
31 Ravenna.....
" Bedford.....
" Barberton.....
" A.....
" B.....
" Canton.....
" Massillon.....
" Beach City.....

Brought.....

" Kenmore Barn.....
51 Akron.....
" Cuyahoga Falls.....
51 Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
52 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Midvale.....
" Canton.....
" Gorge.....
53 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
54 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
55 Ravenna.....
" Bedford.....

198 Mr. Mather:

Q. I hand you herewith some documents permanently attached and fastened together, the outside one of which is marked Defendant's exhibit P. and ask you to examine them and state what they are?

A. There are two receipts in this bunch of papers that pertain to the taxes on the Gorge property, with the corners turned down to identify them.

Q. Can you further identify them?

A. The bills are made out to Henry A. Everett for $8.99 and The Northern Ohio Traction & Light Company for $3.22.

Q. What is the description of the property appearing on those two?

A. In the latter one is the strip South of Grantee North of S M Pt. In the former one in the first item is "N."—in the second, "Between River and Race" and the third, "N. E."

Q. Do you know what property that refers to?

A. It refers to the gorge property.

Q. Are there any other—are those tax receipts relative to the gorge property?

A. Yes, sir. There is one more in this bunch.

Q. What appears in the description there?

A. The invoice is made to Henry A. Everett, the first item is "M W," the second one is "N of River" the third one is "Old Maid's Kitchen" and the fourth is the letter "N."

Q. That is for how much?

A. $245.66.

Q. And it is under a column with what heading this $245.66 is under what head?

199 A. Last half tax of 1910.

Q. By whom were those paid if you know?

A. By The Northern Ohio Traction & Light Company.

Q. As evidenced by what?

A. Their check attached.

Q. When is that check dated?

A. July 21st. 1911.

Q. And signed by whom?

A. J. R. Nutt, Treasurer and Charles Currie, Second Vice President.

Q. What is the amount of it?

A. $12,397.05.

Mr. Mather: We offer this in evidence.

Q. Does that check cover the payment of the three items as shown by the vouchers described in your testimony?

A. Yes, sir.

A true copy of that portion of said *said* Defendant's exhibit P. showing said three items and said check, is hereto next annexed and made a part hereof.

203 The Northern Ohio Traction & Light Co. No. 22241.

AKRON, OHIO, Jul- 21, 1911.

Pay to the order of I. S. Myers Treas. $12,397.05 Twelve Thousand three hundred Ninety seven 05 Dollars.

To The Central Savings & Trust Co., Akron, Ohio.

THE NORTHERN OHIO TRACTION & LIGHT CO.
J. R. NUTT, *Treasurer.*

Countersigned:

CHAS. CURRIE,
2nd V.-President.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

204 DEFENDANT'S EX. P.

JUNE, 1914

No. 98

☞ PAY AT
TREASURER'S OFFICE

RECEIVED of _____, _____

For taxes on the following described property for the year 1913 in the Township of

OWNER'S NAME	R	T	Tract	Lot	DESCRIPTION
Everette Henry	11	2	3	6	N.
			2		Red River
			3	0	N. E.
For Rate of Tax see other side					

☞ Examine this Receipt and see that all your Lands and Lots appear thereon as ~~Law forbids Official to abate Penalties on Delinquent~~ Tax

Collector _____

PAY AT CASHIER'S WINDOW
R'S OFFICE, AKRON, SUMMIT COUNTY, OHIO

~~WM. H. KROEGER~~, Treasurer
D. S. Myers.

_____ dollars _____ cents _____ 191[illegible]

wnship of ~~COVENTRY~~ Portage

☞ Books Open April 1 to June 20

DESCRIPTION	Acres	100	Value	Delinq. Tax Dec. 191[illegible]		Penalty		Special		Last Half Tax 191[illegible]		Due June 20, 191[illegible]		Total Tax 191[illegible]	
				D	C	D	C	D	C	D	C	D	C	D	C
Rivers & Race.	39	14	390							4	33				
	38	16	380							4	22				
	3	50	40								44				
										8	99				
Total															

ector _____

When Tax is paid this bill must be receipted with Official Stamp of the Treasurer

200

" Boston School	.72
" Portage School	.85
Northfield Village	.57
" Macedonia Village	.88
Norton	.70
" Wadsworth School	.68
" Coventry School	.61
" Western Star School	.62
" Western Star Village	.54
" Barberton School	.93
" Barberton City	1.14
Portage	.80
" Akron School	.86
Richfield	1.02
" Boston School	.66
" Hinkley School	1.04
Springfield	.84
" Suffield School	.65
" Akron School	.86
" Mogadore School	.96
" Mogadore Village	1.14
Stow	.82
" Monroe Falls School	.59
Tallmadge	.74
" Monroe Falls School	.58
Twinsburg	1.18
Akron	1.26

No. 300

☞ PAY AT
TREASURER'S OFFICE

RECEIVED of _____, _____

For taxes on the following described property for the year 191[illegible] in the Township of P[illegible]

OWNER'S NAME	R	T	Tract	Lot	DESCRIPTION
Northern Ohio Traction & Light Co.	11	2	2		Strip S. of N. [illegible]
For Rate of Tax see other side					

☞ Examine this Receipt and see that all your Lands and Lots appear thereon as ~~Law forbids Official to abate Penalties on Delinquent Tax~~

Collector _____

JUNE, 1914

PAY AT CASHIER'S WINDOW

R'S OFFICE, AKRON, SUMMIT COUNTY, OHIO

~~WM. H. KROEGER~~, Treasurer
S. S. Myers

dollars cents 11 1914

wnship of PORTAGE

☞ Books Open April 1 to June 20

DESCRIPTION	Acres	100	Value	Delinq. Tax Dec. 1913		Penalty		Special		Last Half Tax 1913		Due June 20, 1914		Total Tax 1914	
				D	C	D	C	D	C	D	C	D	C	D	C
S. S. Granted	2	30	90							1	00				
38 Mpt.	2		200							2	22				
										3	22				
Total															

ctor

When Tax is paid this bill must be receipted with Official Stamp of the Treasurer

201

~~WM. H. KROEGER~~, Treasurer
S. S. Myers

its 1914

☞ Books Open April 1 to June 20

Special		Last Half Tax 1913		Due June 20, 1914		Total Tax 1914	
D	C	D	C	D	C	D	C
		24	39				
		8	30				
		2	08				
		209	33				
		1	56				
		246	66				

hen Tax is paid this bill must be receipted with Official Stamp of the Treasurer

202

233 Repairs customers' installation

T.

Beach City

Bedford

" Portage School	.85
Northfield Village	.57
" Macedonia Village	.88
Norton	.70
" Wadsworth School	.68
" Coventry School	.61
" Western Star School	.62
" Western Star Village	.54
" Barberton School	.93
" Barberton City	1.14
Portage	.80
" Akron School	.86
Richfield	1.02
" Boston School	.60
" Hinkley School	1.04
Springfield	.84
" Suffield School	.65
" Akron School	.86
" Mogadore School	.96
" Mogadore Village	1.14
Stow	.82
" Monroe Falls School	.59
Tallmadge	.74
" Monroe Falls School	.58
Twinsburg	1.18
Akron	1.26

JUNE 1914

No. 1132

☞ PAY AT CA
TREASURER'S OFFICE, AL

RECEIVED of Everett Heisey Q. ____, ____

For taxes on the following described property for the year 1918 in the Township of ~~PORT~~

OWNER'S NAME	R	T	Tract	Lot	DESCRIPTION
			1		M. W.
			2		R. F. Rive
			2		Old Maids
			2		R
			2		
For Rate of Tax see other side					

☞ Examine this Receipt and see that all your Lands and Lots appear thereon ~~as Law forbids Official to abate Penalties on Delinquent Tax~~

Collector ____

PAY AT CASHIER'S WINDOW
R'S OFFICE, AKRON, SUMMIT COUNTY, OHIO

WM. H. KROEGER, Treasurer
S. S Myers

dollars cents 1914

wnship of ~~PORTAGE~~ Cuyahoga Falls.

☞ Books Open April 1 to June 20

DESCRIPTION	Acres	100	Value	Delinq. Tax Dec. 1913		Penalty		Special		Last Half Tax 1914		Due June 20, 1914		Total Tax 1914	
				D	C	D	C	D	C	D	C	D	C	D	C
S.	40	34	1410							24	39				
River	6		480							8	30				
Maids Kitchen	1	13	120							2	08				
	30		1210							209	33				
	1	50	40							1	56				
										246	66				
Total															

tor

When Tax is paid this bill must be receipted with Official Stamp of the Treasurer

" Portage School	.85
" Portage School	.85
Northfield Village	.57
" Macedonia Village	.88
Norton	.70
" Wadsworth School	.68
" Coventry School	.61
" Western Star School	.62
" Western Star Village	.54
" Barberton School	.93
" Barberton City	1.14
Portage	.80
" Akron School	.86
Richfield	1.02
" Boston School	.66
" Hinkley School	1.04
Springfield	.84
" Suffield School	.65
" Akron School	.86
" Mogadore School	.96
" Mogadore Village	1.14
Stow	.82
" Monroe Falls School	.59
Tallmadge	.74
" Monroe Falls School	.58
Twinsburg	1.18
Akron	1.26

Form 5—53M—8-10-13—41637

No. 2312 $ 12,397.05

Summit County Treasurer

City

For Taxes

Month of July 1911

The Northern Ohio Traction and Light Company

MISCELLANEOUS

Expense Account		
Material on Hand, Cuyahoga Falls		
" " " Canton		
Electrical Supplies		
ROAD.		$67.73
#110 Kenmore Road Paving	967.73	
The Northern Realty Company		99.03
Taxes Accrued	11,330.29	

RAILWAY

1	Supt. Ways and S.			Brought	
2	Ballast		54	Mis. p'rp't sup. & ex.	
3	Ties		55	Sub st'n sup. and exp.	
4	Rails		56	Power purchased	
5	Rail F'st'ng & Joints		57	Power exch'n'd Bal.	
6	Specia Work		58	Other operations, Dr.	
7	Underground con't'n.		59	Other operations, Cr.	
8	R. and T. Labor		60	Pass. con., mot., tr'm	
9	Paving		61	Ft. & ex. " " "	
10	Misc. R. & T. exp.		62	Mis. car service emp.	
11	Cleaning & Sanding		63	Mis. car service exp.	
12	Remov, snow, ice, s'd		64	Station employees	
13	Tunnels		65	Station expenses	
15	Bridg., tres, & culv.		66	Carhouse employees	
16	Cros'gs, fence, signs		67	Carhouse expenses	
17	Signal & in'd'l'gsys		68	Op. sig'l int'rl'k'g sys	
18	Tel. & telg. systems		69	Op. tel. & telg. sys.	
19	Other mis. way exp.		70	Ex. frt. coll'ns & deliv.	
20	Poles and fixtures		71	Loss and damage	
21	Underg'd conduits		72	Other transp'n exp.	
22	Transmission system		73	Sal. & ex. gen. of'rs.	
23	Distribution system		74	Sal. ex. gen. of cks.	
24	Misc. electric line exp.		75	Gen. of Sup. & ex	
25	Buildings & structures		76	Law expenses	
26	Dep'c'n way & str's.		77	Relief Dept. exp.	
27	Other operations, Dr.		78	Pensions	
28	Other operations, Cr.		79	Mis. general exp.	
29	Super. of equipment		80	Other operations, Dr.	
30	Power plant equip't		81	Other operations, Cr.	
31	Substation equipment		82	Injuries and damages	
32	Pass'g'r & comb. cars		83	Insurance	

SUB-DIVISION OF POWER AND SUBSTATION EXPENSES

	Brought		
	TRANSMISSION		
209	Sub station wages		
210	Maint. trans. lines		
211	Sub station sup. & exp		
212	Maintaining sub station buildings		
213	" " " equipment		
	STORAGE BATTERY		
214	Wages		
215	Supplies		
216	Battery repairs		
217	" accessories		
	DISTRIBUTION		
218	Wages		
219	Supplies and expenses		
220	Set'g and rem. meters and transformers		
221	Underground conduits		
222	Overhead dis. lines		
223	Underground dis. lines		
224	Services		
225	Transformers		
226	Meters		
	UTILIZATION		
227	Commercial arc installation		
228	Inspection customers' premises		
229	Municipal arc installation		
230	" incandescent installation		
231	Commercial arc repairs		
232	" incandescent renewals		

25	Akron		
	" Cuyahoga Falls		
	" Bedford		
	" Ravenna		
	" Barberton		
	" A		
	" B		
	" Beach City		
	" Canton		
	" High St		
	" Midvale		
	" Macedonia		
	" Gorge		
	" Kenmore Barn		
30	Akron		
	" Cuyahoga Falls		
	" Bedford		
	" Canton		
	" Midvale		
	" Gorge		
31	Ravenna		
	" Bedford		
	" Barberton		
	" A		
	" B		
	" Canton		
	" Massillon		

	Brought		
	" Kenmore Barn		
51	Akron		
	" Cuyahoga Falls		
51	Bedford		
	" Canton		
	" Midvale		
	" Gorge		
52	Akron		
	" Cuyahoga Falls		
	" Bedford		
	" Midvale		
	" Canton		
	" Gorge		
53	Akron		
	" Cuyahoga Falls		
	" Bedford		
	" Canton		
	" Midvale		
	" Gorge		
54	Akron		
	" Cuyahoga Falls		
	" Bedford		
	" Canton		
	" Midvale		
	" Gorge		
55	Ravenna		

205 Mr. Mather:

Q. Mr. Lahr, I hand you a number of documents attached together, the outside of which is marked defendant's exhibit Q, and ask you to examine them and state what they are?

A. The first item is made out to Henry Everett. The first description is "N." the second line is "Between River and Race" and the third is "N.E."

Q. Is that a tax voucher?

A. Yes, sir.

Q. What is the total amount of the taxes entered on that voucher?

A. On the entire voucher?

Q. No, on this one this particular one?

A. $7.12.

Q. Does that description relate to the Gorge property, the portion of it which is described in the plaintiff's petition in this case?

A. It does. The second item is billed to The Northern Ohio Traction & Light Company, the description is "Strip S. of Grantee" the second line is Capital "N of S M Pt" for $2.55.

Q. Does that description relate to the Gorge property, the portion of it which is described in the plaintiff's' petition?

A. Yes, sir.

Q. What is the amount of that item?

A. $2.55.

Q. Is that all of the tax vouchers in that list that relate to the gorge property?

A. Yes, sir.

206 Q. Have those been paid?

A. Yes, sir.

Q. How is that evidenced by that exhibit?

A. By the attached check.

Q. Dated when?

A. July 18th, 1908.

Q. And signed by whom?

A. The Northern Ohio Traction & Light Company by J. R. Nutt, treasurer and countersigned by Will Christy, Vice President.

Q. What is the amount of the check?

A. $8,811.23.

Q. Does that check pay taxes for other property than this described in the vouchers first mentioned?

A. Yes, sir.

A true copy of said voucher, that part thereof containing said two items and said check is hereto next annexed and made a part hereof at pages

210 The Northern Ohio Traction & Light Co. No. 12348.

AKRON, OHIO, Jul- 18, 1908.

Pay to the order of Chas. Currie Gen'l Manager $8,811.23 Eight Eight Hundred and Eleven 23/ Dollars.

To The Central Savings & Trust Co., Akron, Ohio.

THE NORTHERN OHIO TRACTION & LIGHT CO.
J. R. NUTT, *Treasurer.*

Countersigned:

WILL CHRISTY,
V.-Presid-.

211 DEFENDANT'S EX. Q.

207 Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

No. 1409

☞ PAY AT
TREASURER'S OFFICE

RECEIVED of _____

For taxes on the following described property for the year 1913 07 in the Township of P

OWNER'S NAME	R	T	Tract	Lot	DESCRIPTIO
Everett Henry A	11	2	3 2 3	6	N Bet Riv N. E
For Rate of Tax see other side					

☞ Examine this Receipt and see that all your Lands and Lots appear thereon as ~~Law forbids~~ Official to abate ~~Penalties on Delinquent~~ Tax

Collector _____

JUNE, 1914

AY AT CASHIER'S WINDOW

~~WM. H.~~

'S OFFICE, AKRON, SUMMIT COUNTY, OHIO

dollars cents

nship of PORTAGE

Books Op

DESCRIPTION	Acres	100	Value	Delinq. Tax Dec. 1943		Penalty		Special		Last Half Tax 1943	
				D	C	D	C	D	C	D	C
(River + Race	39	14	396							34	
	38	16	380							33	
	3	50	40								3
										7	1
Total											

tor

When Tax is paid this
with Official Stamp

~~ROEGER~~, Treasurer

Myers

08

1914

n April 1 to June 20

Due June 20, 1914 08		Total Tax 1913 07	
D	C	D	C

ill must be receipted
of the Treasurer

~~WM. H. KROEGER~~, Treasurer

J S. Myers.

08

1914

Books Open April 1 to June 20

Last Half Tax 1913 07		Due June 20, 1914 08		Total Tax 1913 07	
D	C	D	C	D	C
	79				
1	76				
2	55				

is paid this bill must be receipted
fficial Stamp of the Treasurer

[illegible]	.82
Stow School	.72
Township Village School	1.40
Village	1.63
Northampton	1.63
Bath School	1.03
Stow School	.96
Boston School	.71

" Portage School	.80
" Portage School	.86
Northfield Village	.57
" Macedonia Village	.88
Norton	.70
" Wadsworth School	.68
" Coventry School	.61
" Western Star School	.62
" Western Star Village	.54
" Barberton School	.93
" Barberton City	1.14
Portage	.80
" Akron School	.86
Richfield	1.02
" Boston School	.66
" Hinkley School	1.04
Springfield	.84
" Suffield School	.65
" Akron School	.86
" Mogadore School	.96
" Mogadore Village	1.14
Stow	.82
" Monroe Falls School	.59
Tallmadge	.74
" Monroe Falls School	.58
Twinsburg	1.18
Akron	1.26

No. 1617 $8,811.23

Summit Co., Treasurer

City

For Taxes

Month of July 1908

The Northern Ohio Traction and Light Company

MISCELLANEOUS

Expense Account			
Material on Hand, Cuyahoga Falls			
" " " Canton			
Electrical Supplies			
Taxes Accrued		8,811.23	
Defendant's Ex. Q.			

2 Ballast				54 Mis. p'rp't sup. & ex.	
3 Ties				55 Sub st'n sup. and exp.	
4 Rails				56 Power purchased	
5 Rail F'st'ng & Joints				57 Power exch'n'd Bal.	
6 Specia Work				58 Other operations, Dr.	
7 Underground con't'n				59 Other operations, Cr.	
8 R. and T. Labor				60 Pass. con., mot., tr'm	
9 Paving				61 Ft. & ex. " " "	
10 Misc. R. & T. exp.				62 Mis. car service emp.	
11 Cleaning & Sanding				63 Mis. car service exp.	
12 Remov, snow, ice, s'd				64 Station employees	
13 Tunnels				65 Station expenses	
15 Bridg., tres, & culv.				66 Carhouse employees	
16 Cross'gs, fence, signs				67 Carhouse expenses	
17 Signal & in'tl'k'gsys				68 Op. sig'l int'tl'k'g sys	
18 Tel. & telg. systems				69 Op. tel. & telg. sys.	
19 Other mis. way exp.				70 Ex. frt. coll'ns & deliv.	
20 Poles and fixtures				71 Loss and damage	
21 Underg'd conduits				72 Other transp'n exp.	
22 Transmission system				73 Sal. & ex. gen. of'rs.	
23 Distribution system				74 Sal. ex. gen. of cks.	
24 Misc. electric line exp.				75 Gen. of Sup. & ex	
25 Buildings & structures				76 Law expenses	
26 Dep'c'n way & str's.				77 Relief Dept. exp.	
27 Other operations, Dr.				78 Pensions	
28 Other operations, Cr.				79 Mis. general exp.	
29 Super. of equipment				80 Other operations, Dr.	
30 Power plant equip't				81 Other operations, Cr.	
31 Substation equipment				82 Injuries and damages	
32 Pass'g'r & comb. cars				83 Insurance	
33 Ft., ex., and mail cars				84 Stationery & printing	

	Brought.....		
	TRANSMISSION		
209	Sub station wages.....		
210	Maint. trans. lines.....		
211	Sub station sup. & exp.....		
212	Maintaining sub station buildings.....		
213	" " " equipment.....		
	STORAGE BATTERY		
214	Wages.....		
215	Supplies.....		
216	Battery repairs.....		
217	" accessories.....		
	DISTRIBUTION		
218	Wages.....		
219	Supplies and expenses.....		
220	Set'g and rem. meters and transformers.....		
221	Underground conduits.....		
222	Overhead dis. lines.....		
223	Underground dis. lines.....		
224	Services.....		
225	Transformers.....		
226	Meters.....		
	UTILIZATION		
227	Commercial arc installation.....		
228	Inspection customers' premises.....		
229	Municipal arc installation.....		
230	" incandescent installation.....		
231	Commercial arc repairs.....		
232	" incandescent renewals.....		

25	Akron.....		
	" Cuyahoga Falls.....		
	" Bedford.....		
	" Ravenna.....		
	" Barberton.....		
	" A.....		
	" B.....		
	" Beach City.....		
	" Canton.....		
	" High St.....		
	" Midvale.....		
	" Macedonia.....		
	" Gorge.....		
	" Kenmore Barn.....		
30	Akron.....		
	" Cuyahoga Falls.....		
	" Bedford.....		
	" Canton.....		
	" Midvale.....		
	" Gorge.....		
31	Ravenna.....		
	" Bedford.....		
	" Barberton.....		
	" A.....		
	" B.....		
	" Canton.....		
	" Massillon.....		

	Brought.....		
	" Kenmore Barn.....		
51	Akron.....		
	" Cuyahoga Falls.....		
51	Bedford.....		
	" Canton.....		
	" Midvale.....		
	" Gorge.....		
52	Akron.....		
	" Cuyahoga Falls.....		
	" Bedford.....		
	" Midvale.....		
	" Canton.....		
	" Gorge.....		
53	Akron.....		
	" Cuyahoga Falls.....		
	" Bedford.....		
	" Canton.....		
	" Midvale.....		
	" Gorge.....		
54	Akron.....		
	" Cuyahoga Falls.....		
	" Bedford.....		
	" Canton.....		
	" Midvale.....		
	" Gorge.....		
55	Ravenna.....		

Mr. Mather:

I hand you a number of documents attached together, the
le one of which is marked defendant's exhibit R. and ask you
amine them and state what they are?
The first one is Billed to The Northern Ohio Traction & Light
pany and the description is first, "North of River, west of road,"
econd line is "M. W." and the third line is "East of Railway"
he total is $78.89.
What is that document if you know?
It is a tax receipt.
What is the next one?
A bill to The Northern Ohio Traction & Light Company, the
iption "Strip S of Grantee," and the second "N of L. N. Pt."
What is the amount of that?
$2.70.
What is that voucher if you know?
Taxes on the gorge property.
What is the next one?
The third is a bill to Henry A. Everett and the description is,
line, "N" and the second line "North of River" and the third
is capital "M" capital "W" and the fourth line is Old Maid's
hen."
What is the amount of that voucher?
$230.03.
Is that a tax receipt?
Yes, sir.
What is the next one?
A. A bill to Henry A. Everett, the description, first line capital "N" and the second line "Between River and race" and the third line is "N 2."
What is the amount of that voucher?
$7.53.
Are those all for the same or—what is the date of the year, amount as shown on the first voucher of $78.89 what is the ding of the column over those figures?
Last half *pax* 1908.
And with respect to the next one?
Last half tax 1908.
And the next one?
Last half tax 1908.
What is the amount of the last one?
$7.53.
Do each of those refer to the gorge property a portion of which described in the plaintiff's petition?
Yes, sir.
Have those been paid?
Yes, sir.
How is that evidenced by that exhibit?
By the attached check.
Dated when?

A. July 16th, 1909.
Q. For what amount?
A. $10,112.29.
Q. Signed by whom?
A. The Northern Ohio Traction & Light Company, J. R.
214 Nutt, Treasurer, and Will Christy, Vice President.

Mr. Mather: We offer in evidence defendant's exhibit R.

A true copy of that portion of the voucher marked defendant's exhibit R, which contains the items and check referred to is hereto next annexed and made a part hereof, see page

No. 1125

☞ PAY A
TREASURER'S OFFI

RECEIVED of _____

For taxes on the following described property for the year 1913 05 in the Township of

OWNER'S NAME	R	T	Tract	Lot	DESCRIPT
N.O.T. + Light Co.	10	3		12	N. J. Rive
	11	2	2		
	10	3		12	E. of Ry.
For Rate of Tax see other side					

☞ Examine this Receipt and see that all your Lands and Lots appear thereon ~~as Law forbids Official to abate Penalties on Delinquent Tax~~

Collector _____

JUNE, 1914 09

PAY AT CASHIER'S WINDOW

ER'S OFFICE, AKRON, SUMMIT COUNTY, OHIO

~~WM. H. KROEGER,~~ Treasurer
J. S. Myers.

dollars cents 1914

ownship of ~~COVENTRY~~ Cuyahoga Falls. Books Open April 1 to June 20

DESCRIPTION	Acres	100	Value	Delinq. Tax Dec. 1913		Penalty		Special		Last Half Tax 1913		Due June 20, 1914		Total Tax 1913	
				D	C	D	C	D	C	D	C	D	C	D	C
River, W. J. Rd.	6	99	760							6	96				
" Ry.	2	59	100							1	31				
	2		70							1	62				
										7	89				
Total															

lector

When Tax is paid this bill must be receipted with Official Stamp of the Treasurer

215

Boston		.58
"	Northampton School	.90
"	Richfield School	.94
"	Peninsula School	.95
"	Peninsula Village	1.06
Copley		1.12
"	Bath School	.56
"	Portage School	.78
"	Sharon School	.96
Coventry		.50
"	Springfield School	.79
"	Barberton School	.82
"	Akron School	.81
"	Barberton City	1.15
"	Kenmore Village	1.04
Cuyahoga Falls		1.20
Franklin		.81
"	Clinton School	1.08
"	Clinton Village	1.06
Green		.90
"	Jackson School	.70
"	Springfield School	.87
Hudson		.56
"	Boston School	.57
"	Stow School	.82
"	Township Village School	.72
"	Village	1.40
Northampton		1.03
"	Bath School	1.03
"	Stow School	.96
"	Boston School	.71
"	[illegible]	.71
"	Boston School	

" Portage School	.83
" Portage School	.85
Northfield Village	.57
" Macedonia Village	.88
Norton	.70
" Wadsworth School	.68
" Coventry School	.61
" Western Star School	.62
" Western Star Village	.54
" Barberton School	.93
" Barberton City	1.14
Portage	.80
" Akron School	.86
Richfield	1.02
" Boston School	.66
" Hinkley School	1.04
Springfield	.84
" Suffield School	.65
" Akron School	.86
" Mogadore School	.96
" Mogadore Village	1.14
Stow	.82
" Monroe Falls School	.59
Tallmadge	.74
" Monroe Falls School	.58
Twinsburg	1.18
Akron	1.26

Form 3—536—8-19-13—41537

No. 5035 $ 10,112.29

Summit County Treasurer

City

For Taxes

Month of July 1909

The Northern Ohio Traction and Light Company

MISCELLANEOUS

Expense Account		
Material on Hand, Cuyahoga Falls		
" " " Canton		
Electrical Supplies		
Taxes Accrued	10,039.86	
Will Christy Trustee	72.43	
Defendant Ex. R.		

1	Supt. ... sys and ...			Brought	
2	Ballast		54	Mis. p'rp't sup. ... ex.	
3	Ties		55	Sub st'n sup. and exp.	
4	Rails		56	Power purchased	
5	Rail F'st'ng & Joints		57	Power exch'n'd Bal.	
6	Specia Work		58	Other operations, Dr.	
7	Underground con't'n		59	Other operations, Cr.	
8	R. and T. Labor		60	Pass. con., mot., tr'm	
9	Paving		61	Ft. & ex. " " "	
10	Misc. R. & T. exp		62	Mis. car service emp.	
11	Cleaning & Sanding		63	Mis. car service exp.	
12	Remov, snow, ice, s'd		64	Station employees	
13	Tunnels		65	Station expenses	
15	Bridg., tres, & culv		66	Carhouse employees	
16	Cross'gs, fence, signs		67	Carhouse expenses	
17	Signal & in'd'l'k'g sys		68	Op. sig'l int'd'l'k'g sys	
18	Tel. & telg. systems		69	Op. tel. & telg. sys.	
19	Other mis. way exp.		70	Ex. frt. coll'ns & deliv.	
20	Poles and fixtures		71	Loss and damage	
21	Underg'd conduits		72	Other transp'n exp.	
22	Transmission system		73	Sal. & ex. gen. of'rs	
23	Distribution system		74	Sal. ex. gen. of cks.	
24	Misc. electric line exp.		76	Gen. of Sup. & ex	
25	Buildings & structures		76	Law expenses	
26	Dep'c'n way & str's		77	Relief Dept. exp.	
27	Other operations, Dr.		78	Pensions	
28	Other operations, Cr.		79	Mis. general exp.	
29	Super. of equipment		80	Other operations, Dr.	
30	Power plant equip't		81	Other operations, Cr.	
31	Substation equipment		82	Injuries and damages	
32	Pass'r & fr. comb. car		83	Insurance	

Brought.....

TRANSMISSION

209 Sub station wages.....
210 Maint. trans. lines.....
211 Sub station sup. & exp.....
212 Maintaining sub station buildings.....
213 " " " equipment.....

STORAGE BATTERY

214 Wages.....
215 Supplies.....
216 Battery repairs.....
217 " accessories.....

DISTRIBUTION

218 Wages.....
219 Supplies and expenses.....
220 Set'g and rem. meters and transformers.....
221 Underground conduits.....
222 Overhead dis. lines.....
223 Underground dis. lines.....
224 Services.....
225 Transformers.....
226 Meters.....

UTILIZATION

227 Commercial arc installation.....
228 Inspection customers' premises.....
229 Municipal arc installation.....
230 " incandescent installation.....
231 Commercial arc repairs.....
232 " incandescent renewals.....

25 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Ravenna.....
" Barberton.....
" A.....
" B.....
" Beach City.....
" Canton.....
" High St.....
" Midvale.....
" Macedonia.....
" Gorge.....
" Kenmore Barn.....
30 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
31 Ravenna.....
" Bedford.....
" Barberton.....
" A.....
" B.....
" Canton.....
" Massillon.....

Brought.....
" Kenmore Barn.....
51 Akron.....
" Cuyahoga Falls.....
51 Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
52 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Midvale.....
" Canton.....
" Gorge.....
53 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
54 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
55 Ravenna.....
" Bedford.....

219 The Northern Ohio Traction & Light Company. No. 15214.

AKRON, OHIO, Jul- 16, 1909.

Pay to the order of Chas. Currie Gen'l Manager $10,112.29 Ten Thousand One Hundred and Twelve 29/ Dollars.

To The Central Savings & Trust Co., Akron, Ohio.

THE NORTHERN OHIO TRACTION & LIGHT CO.
J. R. NUTT, *Treasurer.*

Countersigned:
WILL CHRISTY,
V.-President.

220 DEFENDANT'- EX. R.

221 Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

222 Mr. Mather: I hand you now a number of documents attached together the outside one of which is marked defendant's exhibit S and ask you to examine them and state what that is?

The Court: What year is that for?

Mr. Mather: He will tell that. It is for 1912.

The Court: I don't see any use of wasting any time on those. You have got the property now.

Mr. Mather: I don't know either. I'll withdraw the offer.

Q. I hand you a document or documents marked defendant's exhibit T-1 and——

Mr. Frank: These exhibits may be offered without any further identification and save the time.

Mr. Mather:

Q. We offer defendant's exhibit T-1 to T-15 inclusive and ask you to examine them and state what they are, just state what they relate to?

A. They relate to preliminary expenditures.

Mr. Frank: They relate to that $1,500, expense testified to yesterday?

A. Yes, sir.

Mr. Mather:

Q. Paid by whom?

A. By the officers of The Northern Ohio Traction & Light Company.

Q. Upon what property?

A. The gorge property for 1910.

Q. Prior to January 20th 1911?

A. Yes, sir.

223 The Court: What is this?

Mr. Mather: The ledger account of The Akron, Bedford and Cleveland Railway Company showing the payment of $10,000.00 for the Millbank property.

Q. I hand you defendant's exhibit U and ask you to examine that and state what that is?

A. The is the ledger or the journal of The A B C Railway Company.

Q. Turn to the page relating to the gorge property? What is this exhibit?

A. The journal of The A. B. C. Railway Company showing an expenditure of $10,000.00.

Mr. Mather: We offer page 317 line reading "folio 62 is that it?

A. Yes, sir.

Mr. Mather: Bills Payable, Dime Bank, $10,000.00 and the following line, Four months from December 10th due 4-10 '97 with interest, and the following line reading capital N. Y. Draft, proceeds, of above, and the following line reading, note used to pur-

chase draft, and the following line to apply on Millbank deal. That and the Entry December 10th 1897.

Mr. Mather:

Q. We also offer page 372 of the same exhibit reading,—the line there?

A. Folio 167, description Millbank $20,000.00. that is the charge, the credit.

Mr. Mather:

Q. And on the opposite page 373 read that.

A. Folio 63, bills payable, mortgage date December 14th '97 5%, semi annual $20,000.00. that is the credit.

Q. I hand you defendant's exhibit W. and ask you to examine it and state what that is?

A. That is the A. B. C. Railway Company's ledger.

224 Mr. Mather: I offer page 167—. Is it agreed I shall read into the record what we want?

Mr. Frank: I want to save an objection and an exception.

Mr. Mather: All I want to show is that——

The Court: What is your objection to this offer?

Mr. Frank: That it is immaterial as a matter of fact.

The Court: Are you making an objection and taking an exception as to the character of the entry?

Mr. Frank: No I won't raise any objection as to the character of it.

The Court: Who made this entry?

Mr. Mather: This is the original book of accounts of The A. B. C. Road from page 167——

Mr. Frank: There is no objection as to the mere fact that the record has not been identified or that this is not the best evidence. Simply that it is immaterial and incompetent.

Mr. Mather:

Q. Read this there as to the purchase of the Millbank property.

A. Page 167, Mill-bank property and hydraulics, 1897, December the tenth, New York Draft, journal folio 316, $10,000.00. June 30th, 1898 Journal folio 372, $20,000.00.

Q. Was that the payment of the bills?

A. That was the note in this item, and paid by The Northern Ohio Traction & Light Company.

225 Cross-examination.

(By Mr. Frank):

Q. Mr. Lahr, on Defendant's exhibit T-1 the item of $20.00 there is for the expenses of Mr. L. E. Beilstein in attending a meeting of the power committee?

A. Yes, sir.

Q. And in your distribution was charged to the New Central Power Station?

A. Yes, sir.

Q. On Defendant's exhibit T-2, 85 cents only is charged to the power station?

A. Yes, sir .

Q. And that item of 85 cents that is express charges on something from the engineers?

A. Yes, sir.

Q. And T-3 the item of $750. relates to some engineering services under date of May 20th, 1910?

A. Yes, sir.

Q. And T-4 an item of fifty dollars is services and expenses of Mr. L. E. Beilstein, one of the directors of The Traction Company?

A. Yes, on the power committee.

Q. And T-6 an item of $5.30 is an item for one day's services in inspecting coal leases in Noble County and expenses?

A. Yes, sir.

Q. And in the distribution charged to The Northern Ohio Power Company?

A. Yes, sir.

226 Q. Exhibit T-7 an item of $5.50 is for meals and lodging likewise charged to The Northern Ohio Power Company?

A. Yes, sir.

Q. *Q* And T-8 an item of $65.10 is for a trip to Coal mines at Ava, Ohio, H. A. Everett, F. S. Borton, L. E. Beilstein, J. T. Ross, F. F. Wilkinson, W .E. Davis, and Charles Currie, hotel, railway fares and so forth and charged to The Northern Ohio Power Company?

A. Yes, sir.

Q. And the *tiem* on exhibit T-9 an item of 75 cents only is chargeable in this list to The Northern Ohio Power Company?

A. Yes, sir.

Q. Only that 75 cent item is in this $1500. list? Is that right?

A. Yes, sir.

Q. You know what that item is there?

A. Three meals for the porter.

Q. That item then is for three meals for the porter on a trip to Canal Dover and return?

A. Yes, sir.

Q. On T-10 thirty cents is all that is charged to The Power Company?

A. Yes, sir.

Q. And that is all that enters into the $1500. list or aggregation in this exhibit?

A. Yes, sir.

Q. Will you select out the thirty cent item and show what it is?

227 A. Yes, sir, an express company receipt for thirty cents.

Q. For the transportation of what?

A. Coal property maps.

Q. From Caldwell Ohio?

A. Yes, sir.

And T-11 $446.81 is expenses of Will Christy, H. A. Everett, les Currie, and W. E. Davis on an eastern trip inspecting car s and power stations?

Yes, sir.

And charged to The Northern Ohio Power Company?

Yes, sir.

And Exhibit T-12 Miscellaneous items of $7.00 is chargeable he Northern Ohio Power Company and the rest of that relates her matters? I believe?

Yes, sir.

And exhibit T-13 an item aggregating $29,208.40, $142.60 enters into this item and is for labor charged to The Northern Power Company? Is that right?

Yes, sir.

And this item on Exhibit T-15 is that rent?

Office rent.

For what room?

It is one of these rooms here which one I cannot say. An there.

An office rented by The Northern Ohio Power company?

A. Yes, sir.

Q. And The Northern Ohio Traction and Light Company paid the rent?

Yes, sir.

T-14 has an $18.00 item chargeable to the Northern Ohio r Company, please find that for me. That is lumber from The erick Lumber Company?

Yes, sir.

In reference to the items relating to the coal property to which led your attention to several —, it is true is it not that during year your company was considering the location of a power house where those coal mines were located?

I do not know.

You say you don't know?

No, sir.

Your relation to this company is auditor?

Yes, sir.

Of the books of the company?

Yes, sir.

Are you a director of the company?

No, sir.

Do you know who the directors of the company now are?

I know who they are now.

You have been—you knew who they were in 1910?

I don't remember the names, I knew who they were, yes, sir.

Had you heard any talk on the part of the directors concerning the location or erection of a power house down where some coal mines are located in Noble county?

jected to.

I didn't.

Q. Do you know who the secretary of The Northern Ohio Power Company is?
A. I do not.
Q. You know who the president is?
A. No, sir.
Q. Are you a director of The Northern Realty Company?
A. The Northern Realty Company?
Q. Yes.
A. I am an officer.
Q. What position do you hold?
A. Secretary and Treasurer.
Q. You have the corporate books of the Company have you?
A. They're at the office.
Q. What is that?
A. They're in our office.

Mr. Mather: I can't see the relevancy of this examination.

230 And thereupon the defendant for the purpose of further maintaining the issues upon its part to be maintained, offered as a witness its attorney, N. O. MATHER, who, being first duly sworn, testified as follows:

Direct examination.

(By Mr. Nesbit).

Q. Your name is N. O. Mather?
A. Yes, sir.
Q. You are one of the attorneys for The Northern Ohio Traction & Light Company?
A. Yes, sir.
Q. Do you know of a corporation known as The Northern Realty Company?
A. I do.
Q. When was it organized if you know?
A. It was organized on the 15th. day of November 1909.
Q. Do you know who the stockholders of that Company are?
A. The stockholders of that company are as follows,—The Northern Ohio Traction & Light Company owns 95 shares; Will Christy owns 1 share; Charles Lahr owns 1 share; Charles Currie owns 1 share; C. F. More owns 1 share; N. O. Mather owns 1 share.
Q. Who are the directors of that Company?
A. Will C*rh*isty and——

231 Mr. Frank: We ask to have the books produced for those affairs.

Mr. Mather: We don't care anything about the evidence if you don't. If you want to find out about the company we will volunteer the information.

The Court: I don't see what difference it makes about this Northern Ohio Realty Company,—I'll sustain the objection.

Mr. Nesbit:

. I'll ask you Mr. Mather if you ever saw a document that has n referred to in the testimony as a declaration of trust signed by ıry A. Everett to The Akron Bedford and Cleveland Railroad ıpany, relating to the property described or at least part of the perty described in the petition?

bjected to—objection overruled—plaintiff excepts.

. I have seen the document. I procured it from the files of Northern Ohio Traction and Light Company about the time the of The Big Cuyahoga Light, Heat and Power Company against Turner, Vaughn and Taylor Company was begun in the probate rt of this county, which was about June 4th or 5th, 1908. I was ined by The Northern Ohio Traction and Light Company at that e as their attorney in the case and got that document from their at that time for examination in connection with that litigation. id it in my office——

The Court:

. Attorney for what company?

. The Northern Ohio Traction & Light company was a party endant in that suit. I had that in my office a long time I should ge two or three years.

Mr. Nesbit:

Q. Do you know where that instrument is now?
A. I do not.
Q. Have you made any search for it?

. I have made a very thorough search for it in my present office the law office I was then in at that time, then Grant, Sieber and ther, and I am unable to find it.

. Do you recall the substance of that instrument?

. I do. When I had it I copied the gist of it on a paper a memorandum for use in that case, and I have that paragraph n me now.

. Can you give us the substance as nearly as you can reciting provisions of that instrument?

Ir. Frank: We object to using that paper.

Ir. Mather: Well, I'll give you my recollection.

Ir. Frank: We have a stenographer who is not familiar with the er that we may have an exception to all this line of testimony nout it being specifically made.

The Court: You may have the exceptions.

Ir. Mather: The instrument recited about as follows: Whereas, *ereas* The Akron, Bedford and Cleveland Railway Company has chased from Jeremiah Millbank, I think the name was, through executor and executrix, naming them, the property, referring to it the gorge property, or The Millbank Property or tract of land, l had paid or obligated itself to pay the entire consideration price refor, and had directed that a conveyance be made to Henry A.

Everett, the undersigned, to hold in trust for the use and benefit o
The Akron, Bedford and Cleveland Railway Company, there-
233 fore in consideration of the premises I the undersigned do
hereby agree to hold in trust said premises for the use and
benefit of The Akron, Bedford and Cleveland Railway Company s
long as it may desire, the company to pay all taxes, assessments and
other charges upon the property, and at any time upon the reques
of The Akron, Bedford and Cleveland Railway Company to convey
said premises to The Akron, Bedford and Cleveland Railway Com
pany or to any person, firm or corporation whom it may name. And
that instrument was signed by Henry A. Everett.

Q. Did you prepare the deed from Henry A. Everett to The North
ern Realty Company conveying this what is known as the gorge prop
erty to The Northern Realty Company?

A. Yes, I did.

Q. What is the fact as to whether you are familiar with that
transaction?

A. I am.

Q. Was any consideration paid Henry A. Everett at the time that
the—for the transfer of that property?

A. Not a cent, and it was signed by Henry A. Everett and Joseph
ine Everett, his wife.

Q. Are you an officer of The Northern Realty Company?

A. Yes, sir.

Q. What relation outside of your being an officer did you have
with the realty company and do you now have?

A. I organized The Northern Realty Company and I have been
its attorney ever since it has been organized.

234 Q. What property does The Northern Realty own?

Objected to——

The Court: What difference does that make? Objection sus-
tained.

Mr. Nesbit:

Q. Who directed you to organize The Northern Realty Com
pany?

Objected to—objection sustained.

Cross-examination.

(By Mr. Frank:)

Q. Who is the secretary of The Northern Ohio Power Com
pany?

A. Of the Northern Ohio Power Company, T. W. Wakeman is
secretary of The Northern Ohio Power Company.

Q. He is still secretary?

A. Yes, sir.

Q. Do you know Mr. Mather when the certificate of subscription
of ten per cent of the capital stock was subscribed to the Northern
Ohio Power Company or made up?

. I can't give you the date. Not exactly. In fact I can't give
you approximately without reference to memorandum.
. Wakeman I take it has the company's books the corporate
ks?
. I don't think he has.
. Where is that?
. I think I have it.
. Will you produce the corporate record for us?
. Of the Power Company?
. Yes.
. I don't think it is competent.

Mr. Frank: We will subpœna you then to produce it and determine its competency afterwards.
Ir. Mather: Well, sure I can produce it if you want to take up time. Is that all you want to know?
Ir. Frank: I want to examine it.
Ir. Mather: You can't examine the private records of The thern Ohio Power Company or of any other corporation unless court deems it competent.
Ir. Mather: I'll now offer in evidence or do offer in evidence deed of Millbanks to Henry A. Everett, dated December 14th. 7, recorded in Volume 233 page 447 Summit County records of ls.

A true copy of said deed is hereto attached and made a part eof.

Ir. Mather: I'll also offer and do now offer in evidence the l of Henry A. Everett to The Northern Realty Company dated ember 20th 1910 and recorded in Volume 383 page 455, Sum- County Records of deeds.

A true copy of said deed is hereto attached and made a part eof at pages to hereof inclusive.)

Ir. Mather: I offer in evidence the deed of George Sackett Trus- to The Akron, Bedford and Cleveland Railway Company, re- led in Volume 235 page 242 Summit County Records of deeds.
Ir. Frank: I shall object to it.
Ir. Mather: We offer it now.
Ir. Frank: I'll object to it now.
The Court: It may be admitted.
Plaintiff excepts.

A true copy of said deed is hereto attached and made a part eof at page — to — hereof inclusive.)

236 Elizabeth M. Anderson, Joseph Milbank, as Executrix and Executor, &c., of Jeremiah Milbank, to Henry A. Everett.

This Indenture, made the fourteenth day of December, in the year of our Lord One Thousand Eight Hundred and Ninety-seven, between Elizabeth M. Anderson and Joseph Millbank, as Executrix and Executor under the last will and testament of Jeremiah Milbank, deceased, Parties of the First Part, and Henry A. Everett, of the City of Cleveland, County of Cuayahoga, and State of Ohio, Party of the Second Part, Witnesseth:

Whereas, the said Jeremiah Milbank died leaving a last will and testament which was duly admitted to probate by the Surrogate's court of the City and County of New York, State of New York, on the 6th day of June, 1884, which said last will and testament was recorded in the records of the office of said Surrogate in liber 326 of Wills, at page 407; and,

237 Whereas, the said parties of the first part were appointed respectively executrix and executor under the said last will and testament, and duly qualified as such and are now the only acting executrix and executor thereunder.

Now, Therefore, the said parties of the first part by virtue of the power of attorney to them given in and by said last will and testament, and in consideration of the sum of one dollar and of other good and valuable considerations, the receipt whereof from the said party of the second part is hereby acknowledged, do hereby grant bargain, sell and convey to the said party of the second part, his heirs, and assigns forever, all the right, title and interest of the said parties of the first part, as executrix and executor as aforesaid, in and to the following described premises (or in and to so much thereof as said Jeremiah Milbank died seized of) to-wit:

All that tract or parcel of land situated, lying and being in the Township of Portage, and in the Village of Cuyahoga Falls, Township of Cuyahoga Falls, County of Summit, and State of Ohio, known as being part of tract number 2, formerly all in said

238 Township of Portage, and described as follows:

Beginning at an iron pin set on the island at the northwest corner of lot number 6, Tract number 3 of Portage Township, and at the southeast corner of a tract of land containing 105.83 acres which was deeded by Seth Day and wife to the Portage Canal and Manufacturing Company, August 6, 1838; thence north 1 degree, 20′ east 1315 feet along the east line of said 105.83 acre tract to a stone pipe at the northeast corner of said 105.83 acre tract; thence north 88 degrees, 30′ west 3405.60 feet along the north line of said 105.83 acre tract to a hard head stone at the northwest corner of said 105.83 acre tract; thence south 0 degrees, 30′ west 760 feet along the west line of said 105.83 acre tract, and which is the west line of Cuyahoga Falls Township, and the same continued to a stone pipe; thence south 87 degrees 38′ east 673 feet to an iron pin which is set 627 feet north of the northeast corner of lot 3, tract 3 Portage Township; thence north 89 degrees, 38′ east 1354.30

to a stone which is set 660 feet north of the northeast corner ot 4, tract 3 Portage Township; thence east 410.50 feet yellow oak tree 24 inches in diameter; thence south 78 degrees, 15′ east 270.60 feet to a yellow oak tree; thence south 8 degrees, 15′ east 108.90 feet to a marked stone; thence south 45 degrees 40′ east 99 feet to a marked white oak tree; ce south 3 degrees 45′ east 170 feet to a stone; thence south egrees east 99 feet to a marked white oak tree; thence south 31 ees east 112.80 feet to a marked black oak tree; thence south egrees east 97.60 feet to a black oak tree; thence north 85 de- 30′ east 408 feet along the north line of lot 5, Tract 3 Portage nship, to the beginning and containing 66.03 acres of land, es magnetical of the year 1879.

so all that certain tract or parcel of land situate, lying and in the said Township of Portage, known as being part of lot ber 5 in tract number 3, and described as follows:

ginning at an iron pin set on the island at the northeast corner id Lot 5; thence south 2 degrees west along the east line of said 9444.46 feet; thence running parallel to and 50 feet from the erly face of the retaining wall of what is known as the Chuckery Race, the following courses and distances:

North 47 degrees, 30′ west 125.40 feet. North 33 degrees 15′ west 112.20 feet. North 15 degrees west 237.60 North 0 degrees 45′ west 191.40 feet. North 11 degrees 30′ 105.60 feet. North 18 degrees 30′ west 132 feet. North 26 ees 30′ west 99 feet to the north line of lot 5. Thence along ine north 86 degrees east 351.78 feet to the beginning and aining 4.50 acres of land. Courses magnetical as surveyed l 15th, 1880.

so all that certain tract or parcel of land situate, lying and in said Township of Portage, known as being part of lot num- in Tract number 3, and described as follows:

ginning at the northeast corner of said lot at a marked hem- tree standing near the north bank of the Cuyahoga River; e north 88 degrees west 1341.10 feet along the south line of belonging to H. C. Grant to an iron pin set on an island in the hoga River at the northwest corner of said lot 6; thence south ree 45′ west 2012.30 feet along the west line of said lot num- to an iron pin set in the center line of the old Akron and Cuyahoga Falls Road; thence north 66 degrees 30′ east 216.48 feet along said road center to an iron pin; thence north 52 degrees 15′ east 844.14 feet along said road center iron pin; thence north 41 degrees 30′ east 217.14 feet along road center to an iron pin; thence north 45 degrees 30′ east 06 feet along said road center to an iron pin; thence north egrees 30′ east along said road center 160.38 feet to an iron thence north 51 degrees 30′ east along road center 231 feet to on pin; thence north 48 degrees east 23.10 feet along road r to an iron pin set in the east line of said lot; thence north 2 es 12′ east 810 feet along the east line of said lot 6 to the

beginning and containing 45.68 acres of land. Courses magnetical of the year 1879.

And also all that certain tract or parcel of land situate, lying and being in the said Village and Township of Cuyahoga Falls, known as being a part of tract number 1, formerly in the Township of Tallmadge, and described as follows:

Beginning at an iron pin set at the northwest corner of
242 tract number 5; thence north 2 degrees 12′ east 763.6 feet along what was formerly the west line of Tallmadge Township to a stone pipe (this line crosses the Cuyahoga River) which stone pipe is set at a point 612 feet south, measuring along said township line from the point where said township line intersects the center line of the County road, recorded as County View number 218; thence from said stone pipe along a line which is one rod west of the high bank of the Cuyahoga River the following courses and distances:

North 34 degrees 35′ east 264 feet; north 27 degrees 35′ east 286.44 feet; north 2 degrees 30′ west 116.16 feet; north 24 degrees 10′ west 138 feet; north 8 degrees 40′ east 107.60 feet; north 19 degrees 31′ east 108.24 feet; north 36 degrees 40′ east 168.30 feet; north 53 degrees 40′ east 454.70 feet, and north 35 degrees east 280.70 feet to a stone pipe set in Thomas Patterson's north line; thence, leaving said one rod line, north 63 degrees 10′ west along Thomas Patterson's north line 85.14 feet to the east line of Front Street and to a stone pipe; thence north 32 degrees 40′ east
243 640 feet along the east line of Front Street to a stone pipe to an angle in east line of said street; thence north 26 degrees 20′ east 268 feet along east line of Front Street to a stone pipe; thence south 63 degrees 40′ east 139.12 feet along the south line of a tract of land containing one and 43/100 acres of land conveyed by Jeremiah Milbank to John Hinde on the 14th day of October, 1879, and which line is in a continuation of the south line of Chestnut Street; thence north 34 degrees 35′ east 380.16 feet along the east line of said 1.43 acres piece of land to its northeast corner; thence north 32 degrees east 89.10 feet (this line is on top of a perpendicular bank on the west side of the Cuyahoga River and is also the east line of the Falls Rivet and Machine Company), thence south 75 degrees east 157 feet on a line of land of said company to a point which is on top of the perpendicular bank on said east side of said river; thence south 23 degrees west 118.80 feet on a line which is on top of said east bank; thence south 63 degrees east 52 feet to the west line of Water Street where an iron grate bar
244 is set; thence south 22 degrees 30′ west 660 feet along the west side of Water Street to an iron pin; thence south 17 degrees 30′ west 663.34 feet along the west side of said Water Street to an iron pin; thence north 63 degrees 37′ west 128.04 feet along north line of land formerly belonging to C. S. Sill to an iron pin; thence south 31 degrees 30′ west 317.46 feet along the west line of same land to an iron pin; thence south 41 degrees 30′ west 341.88 feet along west line of same land to an iron pin; thence south 78 degrees 30′ east 289.74 feet along south line of same land to an iron

thence south 30 degrees 30′ west 824.34 feet to an iron pin; ce north 81 degrees west 69.96 feet along the north line of land nging to William Walsh to an iron pin; thence south 31 de- s 30′ west 820.40 feet along west line of land belonging to Wil- Walsh to an iron pin; thence south 87 degrees 30′ west 66 ; thence south 29 degrees 30′ west 144.50 feet; thence north 87 degrees 30′ west 258.72 feet along the north line of tract 5 to the beginning, and containing 43.68 acres of land, courses magnetical for the year 1879.

ıbject to the rights of the Cleveland, Akron and Columbus Rail- Company.

e all the aforesaid courses and distances more or less.

lso all water power and milling rights belonging to the said ıises, excepting such as may have been conveyed by the said miah Milbank.

nd all the estate, title and interest of the said parties of the part, either in law or in equity, of, in and to the said premises, also all the estate, title and interest of the said parties of the part, of, in and to any and all other real property in said town- s of Portage and Cuyahoga Falls of which said Jeremiah Mil- k died seized, together with all the rights, privileges and appur- nces to the same belonging, and all the rents, issues and profits thereof.

To have and to hold the same to the only proper use of the said party of the second part, his heirs and assigns for- , subject, however, to any and all legal highways, easements, lic rights, and rights granted or accrued to any steam, electric, ther railroad or railroad company, or any individual, and also ect to all taxes and assessments on the said premises or any part eof subsequent to the taxes or assessments payable in the year 3.

nd said Elizabeth M. Anderson and Joseph Milbank for them- es, their heirs, executors, and administrators, do hereby covenant the said party of the second part, his heirs and assigns, that her the said Elizabeth M. Anderson nor the said Joseph Mil- k has done nor suffered anything whereby the said premises have n encumbered in any way whatever.

n witness whereof, the said parties of the first part have here- o set their hands and seals the day and year first above writ- ten.

ELIZABETH M. ANDERSON,
As Ex'tx., Etc.,

JOSEPH MILBANK,
As Ex'c'r, &c.

igned, sealed and delivered in the presence of:

ALBERT E. SEIBERT.
GEO. H. CORRY.

STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that on the seventeenth day of December, 1897, before me personally appeared Elizabeth M. Anderson, one of the persons who executed the foregoing instrument, and duly acknowledged that she executed the same as executrix as therein described as her free and voluntary act and deed for the uses and purposes therein expressed and mentioned.

In witness whereof, I have hereunto set my hand and official seal the day and year last above written.

[SEAL.] GEO. H. CORRY,
Commissioner of the State of Ohio, Office 56 Wall Street, New York.

STATE OF NEW YORK,
City and County of New York:

248 Be it remembered that on the eighteenth day of December, 1897, before me personally appeared Joseph Milbank, one of the persons who executed the foregoing instrument, and duly acknowledged that he executed the same as executor as therein described as his free and voluntary act and deed for the uses and purposes therein expressed and mentioned.

In witness whereof, I have hereunto set my hand and official seal the day and year last above written.

[SEAL.] GEO. H. CURRY,
Commissioner of the State of Ohio, Office 56 Wall Street, New York.

Received Dec. 23", 1897, at 8:40 A. M.
Recorded Dec. 29", 1897.
W. ALLING, *Recorder.*

249 *Deed.*

No. 34411.

H. A. Everett to The Northern Realty Co.

Know All Men By These Presents, That I, H. A. Everett, the Grantor, for Divers Good causes and Consideration thereunto moving, and especially for the sum of One Dollar ($1.00) received to my full satisfaction of The Northern Realty Co., the Grantee, have Given, Granted, Remised, Released and forever Quit-claimed, and do by these presents absolutely Give, Grant, Remise, Release and forever Quit-claim unto the said Grantee, its successors and assigns forever, all such right and Title as I, the said Grantor, have or ought to have in and to the following described Pieces or Parcels of Land.

First Parcel. Situated in the Township of Portage, County of Summit, and State of Ohio, and known as all that tract or parcel

land situated, lying and being in the Township of Portage, and
in the Village of Cuyahoga Falls, Township of Cuyahoga
) Falls, County of Summit and State of Ohio, known as being
part of tract No. 2, formerly all in said Township of Portage
l described as follows:

Beginning at an iron pin set on the island at the Northwest cor-
r of Lot No. 6, Tract No. 3 of Portage Township, and at the
itheast corner of a tract of land containing 105.83 acres, which
s deeded by Seth Day and Wife to The Portage Canal and Manu-
turing Company, August 6th, 1838; thence north 1 degree 20′
st 1315 feet along the east line of said 105.83 acre tract to a
ne pipe at the Northwest corner of said 105.83 acre tract; thence
rth 88 degrees 30′ West 3405.60 feet along the North line of
l 105.83 acre tract to a hard head stone at the Northwest corner
said 105.83 acre tract; thence south 0 degrees 30′ West 760 feet
ng the West line of said 105.83 acre tract and which is the West
e of Cuyahoga Falls Township, and the same continued to a
ne pipe; thence south 87 degrees 38′ East 673 feet to an iron pin
ich is set 62 feet North of the North-west corner of Lot 3,
act 3, Portage Township; thence North 89 degrees 38′ East 1354.30
feet to a stone which is set 660 feet North to the North-east
l corner of Lot 4, Tract 3, Portage Township; thence East
410.50 feet to a yellow oak tree 24 inches in diameter; thence
uth 78 degrees 15′ East 270.60 feet to a yellow oak tree; thence
uth 8 degrees 15′ East 108.90 feet to a marked stone; thence
uth 45 degrees 40′ East 99 feet to a marked white oak tree; thence
uth 3 degrees 45′ East 170 feet to a stone; thence south 46
grees East 99 feet to a marked white oak tree; thence south 31
grees East 112.80 feet to a marked black oak tree; thence South 56
grees East 97.60 feet to a black oak tree; thence North 85 degrees
′ East 408 feet along the North line of Lot 5, Tract 3, Portage
wnship to the beginning, and containing 66.03 acres of land,
urses magnetical of the year 1879.

Second Parcel. Also, all that certain tract or parcel of land sit-
ted, lying and being in the said Township of Portage, known as
ng part of Lot No. 5, in Tract No. 3, described as follows:

Beginning at an iron pin set on the island at the Northeast corner
of said Lot No. 5; thence South 2 degrees West along the
2 East line of said Lot No. 5, 944.46 feet; thence running
northerly parallel to and 50 feet from the Northerly face of the
aining wall of what is known as the Chuckery Race, the follow-
g courses and distances, North 47 degrees 30′ West 125.40 feet;
rth 33 degrees 15′ West 112.20 feet; North 15 degrees West
7.60 feet; North 0 degrees 45′ West 191.40 feet; North 11 degrees
′ West 105.60 feet; North 18 degrees 30′ West 132 feet; North
degrees 30′ West 99 feet to the North line of Lot 5; thence along
line North 86 degrees East 351.78 feet to the beginning, con-
ning 4.50 acres of land.

Courses magnetical as surveyed April 15th, 1880.

Third Parcel. Also, all that certain tract or parcel of land sit-

uated, lying and being in said Township of Portage, known as being part of Lot No. 6, in Tract No. 3, and described as follows:

Beginning at the North-east corner of said lot at a marked hemlock tree standing near the North Bank of the Cuyahoga River; thence North 88 degrees West 1341.10 feet along the South line of land belonging to H. C. Grant, to an iron pin set on an island in the Cuyahoga River at the Northwest corner of said Lot 6;
253 thence South 1 degree 45′ West 2012.30 feet along the West line of said Lot No. 6, to an iron pin set in the center line of the old Akron and Cuyahoga Falls Road; thence North 66 degrees 30′ East 216.48 feet along the Road center to an iron pin; thence North 52 degrees 15′ East 844.14 feet along said Road center to an iron pin; thence North 41 degrees 30′ East 217.14 feet along said Road center to an iron pin; thence north 45 degrees 30′ East 135.96 feet along said Road center to an iron pin; thence North 31 degrees 30′ East along said Road center 160.38 feet to an iron pin; thence North 51 degrees 30′ East along Road center 231 feet to an iron pin; thence North 48 degrees East 23.10 feet along Road Center to an iron pin set in the east line of said Lot; thence North 2 degrees 12′ East 810 feet along the East line of said Lot 6, to the beginning, and containing 45.68 acres of land, courses magnetical of the year 1879.

Fourth Parcel. And also, all that certain tract or parcel of land situated, lying and being in the Village and Township of Cuyahoga Falls known as being a part of Tract No. 1, formerly in the Township of Tallmadge, and described as follows:
254 Beginning at an iron pin set at the northwest corner of Tract No. 5; thence North 2 degrees 12′ East 763.6 feet along what was formerly the west line of Tallmadge Township to a stone pipe (this line crosses the Cuyahoga River) which stone pipe is set at a point 612 feet South, measured along the Township line from the point where said Township line intersects the center line of the County Road, recorded as County View No. 218; thence from said stone pipe along a line which is one rod West of the high bank of the Cuyahoga River, the following courses and distances, North 34 degrees 35′ East 264 feet; North 27 degrees 35′ East 286.44 feet; North 2 degrees 30′ West 116.16 feet; North 24 degrees 10′ West 138 feet; North 8 degrees 40′ East 107.60 feet; North 19 degrees 31′ East 108.24 feet; North 36 degrees 40′ East 168.30 feet; North 53 degrees 40′ East 454.70 feet; and North 35 degrees East 280.70 feet to a stone pipe set in Thomas Patterson's North line; thence, leaving said one rod line North 63 degrees 10′ West along Thomas Patterson's North line 85.14 feet to the east line of Front street, and to a stone
255 pipe; thence North 32 degrees 40′ East 640 feet along the east line of Front street to a stone pipe to an angle in East line of said street; thence North 26 degrees 20′ East 268 feet along East line of Front street to a stone pipe; thence South 63 degrees 40′ East 139.12 feet along the South line of a tract of land containing 1.43 acres of land, conveyed by Jeremiah Milbank to John Hinde on the 14th. day of October, 1879, and which line is in a continuation of the South line of Ches-nut street; thence North 34 degrees 35′ East

380.16 feet along the East line of said 1.43 acre piece of land to its Northwest corner; thence North 32 degrees East 89.10 feet (this line s on top of a perpendicular bank on the West side of the Cuyahoga River, and is also the East line of the Falls Rivet and Machine Com-pany); thence South 75 degrees East 157 feet on a line of land of said Company to a point which is on top of the perpendicular bank on said side of said River; thence South 23 degrees 118.80 feet on a line which is on top of said East bank; thence South 63 degrees East 52 feet to the West line of Water street where an iron grate bar is set; thence South 22 degrees 30′ West 660 feet along the West
256 side of Water street to an iron pin; thence South 17 degrees 30′ West 665.34 feet along the West side of said Water street to an iron pin; thence North 63 degrees 37′ West 128.04 feet along the North line of land formerly belonging to C. S. Sill, to an iron pin; thence South 31 degrees 30′ West 317.46 feet along the west line of same land to an iron pin; thence South 41 degrees 30′ West 341.88 feet along West line of same land to an iron pin; thence South 78 degrees 30′ East 289.74 feet along the South line of same land to an iron pin; thence South 30 degrees 30′ West 824.34 feet to an iron pin; thence North 81 degrees West 69.96 feet along the North line of land belonging to William Walsh, to an iron pin; thence South 31 degrees 30′ West 820.40 feet along West line of land belonging to William Walsh to an iron pin; thence South 87 degrees 30′ West 66 feet; thence South 29 degrees 30′ West 144.50 feet; Thence North 87 degrees 30′ West 258.72 feet along the North line of Tract 5, to the beginning, containing 43.68 acres of land, courses magnetical for the year 1879. Subject to the rights of the Cleveland, Akron and
257 Columbus Railroad Company. Be all the aforesaid courses and distances more or less. Also all water power and milling rights belonging to the said premises, except such as may have been conveyed by the said Jeremiah Milbank. And all the estate, title and interest of the said parties of the first part either in law or equity, of, in and to the said premises, and also, all the estate, title and interest of the said parties of the first part, of, in and to any and all other real property in said Township of Portage and Cuyahoga Falls, of which said Jeremiah Milbank died seized, together with all the rights, privileges and appurtenances to the same belonging, and all rents, issues, and profits thereof.

Fifth Parcel. And also, all that certain tract or parcel of land situated in the Village of Cuyahoga Falls, County of Summit, and State of Ohio, and known as being part of Tract No. 2 formerly in Portage Township; Beginning at a stone pipe set at the Southeast corner of a 5.16 acre tract of land conveyed by Enoch Woodruff to Horace B. Camp, Trustee, by deed dated November 23rd.
258 1872 (and of which 5.16 acre tract, the following described premises are the South part); thence North 88½ degrees West 467 feet to a stone pipe at the Southwest corner of said 5.16 acre tract; thence North ½ degree East 105 feet along the West line of said 5.16 acre tract to a stone pipe; thence South 88½ de- East 467 feet to a stone pipe set in the East line of said 5.16 acre tract of land; thence South ½ degree West 105 feet along the West line of a

road 30 feet wide, to the beginning and including the "Old Maid's Kitchen" so called, and including 1.127 acres of land.

Sixth Parcel. And also, all that certain tract or parcel of land situated in the Village of Cuyahoga Falls, County of Summit, and State of Ohio, and known as part of tract No. 2 formerly in Portage Township; Beginning at a sewer pipe in the old Township line 572 feet Southerly from a sewer pipe set in the center of Front Street at the intersection of the said Township line with said street center; thence South along Township line and West line of lands now owned by Grantee 334 feet to the South east corner of grantors land; thence Westerly along the North line of land now owned by *by* Gran-
259 tee 390.5 feet to a sewer pipe which is 452 feet from a sewer pipe set in the Southerly side on the line with Front street and s-t in the line between Grantor and Grantee; thence North 53 degrees 09′ East 511.2 feet to the beginning, contains One and One half acres of land, (1.50). To have and to Hold the premises aforesaid, with the appurtenances thereunto belonging, to the said Grantee, its successors and assigns, so that neither the said Grantor nor his heirs, nor any other persons claiming title through or under him, shall or will hereafter claim or demand any right or title to the premises, or any part thereof; but they and every one of them shall by these presents be excluded and forever barred.

And I, the said Josephine P. Everett, Wife of said H. A. Everett, do hereby remise, release and forever quit-claim, unto the said Grantee, its successors and assigns, all my right and title of Dower in the above described premises.

In Witness Whereof We hereunto set our hands the 20th. day of December, In the year of our Lord, One Thousand Nine Hundred and Ten.

260 H. A. EVERETT.
JOSEPHINE EVERETT.

Signed and acknowledged in presence of
J. R. NUTT.
W. H. KIASER, Jr.

THE STATE OF OHIO,
Cuyahoga County, ss:

Before me a Notary Public in and for said County personally Appeared H. A. Everett and Josephine P. Everett who acknowledged that they did sign the foregoing instrument, and that the same, is their free act and deed.

In testimony Whereof, I have hereunto set my hand and official seal, at Cleveland Ohio this 20th. day of December, A. D. 1910.

[SEAL.] W. H. KIASER, Jr.,
Notary Public.

Transferred, Dec. 22nd. 1910.
Received for record, December 22nd. 1910. at 3.15 P. M.
Recorded, Jan. 10th. 1911.
Fee $2.85.

JAMES BROWN, *Recorder.*

George Sackett, Trustee, to The Akron Bedford and Cleveland Railroad Company.

Know All Men by These Presents: That George Sackett, Trustee, grantor for the consideration of One Dollar ($1.00) received full satisfaction of The Akron Bedford and Cleveland Railroad mpany, the grantee, do give, grant, bargain, sell and convey unto said grantee its successors and assigns, the following described mises situated in the Village of Cuyahoga Falls, County of mmit, and State of Ohio, and known as being part of Tract Two, merly Portage Township, beginning at an iron pin set upon an nd in the Cuyahoga River in 1879 by T. D. Paul Surveyor. Said being at the southwest corner of land formerly owned by H. Grant, and at the northwest corner of 45.15 acre tract, and the theast corner of 82.50 acre tract, both owned by the Estate of emiah Milbank; thence north 2° 05′ E. 937 feet along east line aforesaid 82.50 acre tract, to within two feet of perpendicular k; Thence south 31° East 566 feet; thence south 37½° East 490 t to the center line of Front street which is a County Road; thence South 47° west 60 feet along said street center to angle; thence 2 south 69½ degrees west 134 feet along said street center to N. Line of 45.15 acre tract; thence North 86¾° west 435 feet ng said north line of 45.15 acre tract to the beginning, contains 9 acres of land. Being the same land conveyed to the grantor as ustee by 2 Warranty Deeds from Henry C. Grant and Sarah M. ant, Husband and Wife. Said deeds being dated August 22nd, 95 and July 1st, 1896 and Recorded in Summit County Records Volume 218, Page 311, and Volume 223 Page 175.

Be the same more or less, but subject to all legal highways. To ve and to Hold, the above granted and bargained premises, with e appurtenances thereunto belonging unto the said grantee, its ccessors and assigns Forever. And I George Sackett, Trustee the d grantor, do or myself and my heirs, executors and administra- rs, covenant with the said grantee its successors and assigns, that and until the ensealing of these presents I am well seized of the ove described Premises as a good and indefeasible estate in Fee Simple and have good right to bargain and sell the same in 3 manner and form as above written and that the same are free from all incumbrances whatsoever so far as affected by my ts, and that I will Warrant and Defend said Premises with the ppurtenances thereunto belonging to the said grantee its successors d assigns Forever against all lawful claims and demands whatso- er so far as effected by my acts.

And I the said Fanny V. Sackett wife of said George Sackett do ereby Remise, Release, and Forever Quit-claim unto the said grantee d its successors and assigns, all my right and title of Dower in the ove described premises.

In witness whereof, I hereunto set my hand this 12th day of

August, in the year of our Lord, one thousand eight hundred and ninety seven.

GEORGE SACKETT, *Trustee.*
FANNY V. SACKETT.

Signed, Sealed, Acknowledged and Delivered in presence of—

MARY P. SMITH,
EMORY A. PRIOR.

264 STATE OF OHIO,
Summit County, ss:

Before me a Notary Public, in and for said County, personally appeared the above named George Sackett Trustee, and Fanny V. Sackett, who acknowledged that he did sign and seal the foregoing instrument, and that the same is his free act and deed.

In Testimony Whereof, I have hereunto set my hand and official seal, this 12th day of August A. D. 1897.

[SEAL.] EMORY A. PRIOR,
Notary Public.

Transferred Oct. 1 1897.
Received Oct. 1st. 3.15 P. M. 1897.
Recorded Oct. 4th, 1897.

WILLISTON ALLING, *Recorder.*

265 Mr. Mather: We offer in evidence the petition of The Big Cuyahoga Light, Heat and Power Company against The Turner, Vaughn and Taylor Company and others, filed in the Probate Court of Summit County, Ohio, June 5th, 1908.

A true copy of said petition is hereto next annexed and made a part hereof, see pages — to — hereof both inclusive.

In the Probate Court.

STATE OF OHIO,
Summit County, ss:

BIG CUYAHOGA LIGHT, HEAT & POWER COMPANY, Plaintiff,
vs.
RY A. EVERETT, THE NORTHERN OHIO TRACTION & LIGHT COMny, The Akron, Bedford & Cleveland Railroad Company, The rner, Vaughn & Taylor Company, Calvin M. Vaughn, The merican Mica, Mining & Milling Company, Cornelius M. Walsh, he Walsh Milling Company, The Falls Hollow Stayblt Comny, The Walsh Paper Company, The Falls Rivet & Machine mpany, Hattie Adelle Fenton, Luna Alice Dover, Fannie S. eebe, Fannie V. Sackett, Charles T. Grant, Michael Metzler, The ntral Trust Company of New York, The Okron Traction & Elecic Company, The Dime Savings & Banking Company of Clevend, Ohio, The Citizens Savings & Trust Company, The Northern hio Traction Company, Henry A. Robinson, The Winton Motor r Company, The Hardware & Supply Company, Augustus Smith d Fannie V. Sackett, Administrators of the Estate of George ckett, Deceased; Josephine Everett, Ludie B. Robinson, and nnie M. Walsh, Defendants.

Petition.

laintiff says it is a corporation duly organized and incorporated r and in pursuance of the laws of the State of Ohio, under the orate name of The Big Cuyahoga Light, Heat & Power Company; by the terms of its charter, it is authorized and empowered to ire, erect, build, maintain and operate a system of dams in the Cuyahoga River in the State of Ohio, to raise and maintain a l of water; to construct and maintain canals, locks and raceways; gulate and carry said head of water to its plants or power houses re electricity is to be generated; to erect and maintain a line or s of poles whereon to attach or string wires or cables to carry and smit electricity; to acquire, produce, manufacture, generate, and electricity for light, heat, power, and other purposes; to acquire, , and sell franchises and privileges, and supply the same to icipal corporations; to acquire by condemnation, lease, purchase, therwise, and to possess, hold, and sell such real estate and perl property as may be necessary for the proper conduct of said ness, and to do any and all other things necessary and incident to any of its said purposes.

That said system of dams, poles, lines, and power stations, canals, locks and raceways which this company proposes to truct, maintain, and operate, commences at the confluence of the and Little Cuyahoga Rivers in Summit County, Ohio, and exls along the said Big Cuyahoga River through Summit County to

the point of intersection of said river with the county line between Summit and Portage Counties.

That this corporation has the right to construct said system of dams and a line of poles whereon to string wires or cables, for the purpose of conveying electricity between its different power stations and property situate along the said river, and also all necessary power houses and stations required by it to generate electricity in, through, and upon such public and private property along its said right of way as it may acquire.

Plaintiff says that it is ready, and will immediately begin, the construction of its dams, pole lines, and power houses, canals, locks, and raceways in and along said river between the terminal points of its right of way as hereinbefore designated.

269 Plaintiff says further that the said Big Cuyahoga River, between the points named herein, and between which it has the right to construct dams, power houses, and other structures for its purposes, is not navigable for boats or other craft.

Plaintiff says that it is necessary, and that it so deems it necessary, in order to carry out the objects and purposes of this corporation, that it shall appropriate, and it intends to appropriate, as a part of its right of way for the construction, maintenance, and operation of its said system of dams, pole lines, and power houses, canals, locks, and raceways, and for the purpose of constructing, maintaining, and operating thereon a dam or dams across said river which will raise the water in the channel thereof on the lands hereafter described, and also a line of poles thereon along the banks of said river, whereon to string wires or cables to convey electricity, and such power houses and other necessary structures as may be required to carry out the purposes of its charter, the following described real estate, to-wit:

Being the following described property: Situated in
270 Summit County, Ohio, and beginning at the point of intersection of the center of the Cuyahoga River and the north and south township line between Portage Township and Cuyahoga Falls Townships; thence north 0 degrees 30′ east 100 feet; thence easterly and southeasterly along the northerly bank of said Cuyahoga River 100 feet distant from the center line of said river, following the meandering of same, to a point on the line between the property of said Henry A. Everett and the property of the A. B. & C. R. R. Company, said point being 100 feet distant from the center of the Cuyahoga River, measured at right angles with same; thence south 1 degree 20′ west along said line between the property of Henry A. Everett and the property of the A. B. & C. R. R. Company to the southwest corner of the property of said A. B. & C. R. R. Company; thence south 88 degrees east along the south line of the property of the A. B. & C. R. R. Company, said line being the dividing line between the property of the A. B. & C. R. R. Company and the property of Henry A. Everett, to a point 100 feet distant from the center of the Cuyahoga River, measured at right angles with same; thence southeasterly and northeasterly along the northerly
271 bank of the Cuyahoga River 100 feet distant from the center line thereof, and following the meanderings of same, to

at on a line of the land of said Henry A. Everett, said line being extension northerly of the east line of Tract No. 3, Portage wnship, Summit County, Ohio, and also being 100 feet distant r the center of the Cuyahoga River measured at right angles h same; thence northerly along said line to a stone pipe; thence therly along the high bank of the Cuyahoga River and one rod sterly of same the following courses and distances; north 34 grees 35′ east 264 feet; thence north 27 degrees 35′ east 286.44 t; thence north 2 degrees 30′ west 116.16 feet; thence north 24 grees 10′ west 138 feet; thence north 8 degrees 40′ east 107.6 t; thence north 19 degrees 31′ east 108.24 feet; thence north 36 grees 40′ east 168.3 feet; thence north 53 degrees 40′ east 454.7 t; thence north 35 degrees east 280.7 feet to the northeast corner the lot owned by Tom Patterson; thence northerly following ng the westerly bank of said Cuyahoga River to the southeast ner of the property of the Falls Rivet & Machine Company; thence along the line between the land of The Falls Rivet & Machine
2 Company and the property of Henry A. Everett to a point on the westerly bank of said river; where said boundary e crosses said river; thence south 75 degrees east 157 feet along e line between the property of The Falls Rivet & Machine Comny and the lands of said Henry A. Everett to a point on the top the bank on the easterly side of said Cuyahoga River; thence uth 23 degrees west 118.80 feet along the top of said east bank; ence south 63 degrees east 52 feet to the west line of Water Street ere an iron grate bar is set; thence south 22 degrees 30′ west 660 t along the west line of Water Street to an iron pin; thence south degrees 30′ west 663.34 feet along the west side of Water Street an iron pin; thence north 63 degrees 37′ west 128.4 feet along rth line of land formerly belonging to C. S. Sill to an iron pipe; ence south 31 degrees 30′ west 317.46 feet along the west line of ne land to an iron pipe; thence south 41 degrees 30′ west 1.88 feet along the west line of said Sill's land to an iron pin; ence southerly and westerly along the southerly bank of the said yahoga River and approximately 100 feet distant from the center line of said river, following the meanderings of same
3 to a point on the north and south township line between Portage Township and Cuyahoga Falls Township; thence north degrees 30′ east along said township line 100 feet to the place of ginning. Contains 40 acres more or less, with all the privileges, sements, rights, and appurtenances thereto belonging.

The above property is owned, or is claimed by him to be owned, Henry A. Everett; and the above property is claimed to be med also by The Northern Ohio Traction & Light Company.

Also the following described real estate, to-wit: Situated in mmit County, Ohio, and beginning at an iron pin at the southst corner of said Railroad Company's land, said pin being on an land in the Cuyahoga River, thence north 1 degree 20′ east along id Railroad Company's west line to a point 100 feet distant from e center of the Cuyahoga River, measured at right angles with me; thence southeasterly to the south line of said Railroad Com-

pany's property at a point 100 feet distant from the center of the Cuyahoga River, measured at right angles with same; thence along the south line of said Railroad Company's' land to the place of beginning. Contains 0.3 acres more or less, with all the privileges, easements, rights, and appurtenances thereunto belonging, all of the above property being in the Township of Cuyahoga Falls.

The above property is owned, or claimed to be owned, by The Northern Ohio Traction & Light Company, The Akron, Bedford & Cleveland Railroad Company claims some ownership or interest in said property; and Henry A. Everett claims some ownership or interest in said property.

Also the following described real estate, to-wit: Situated in Cuyahoga Falls, Summit County, Ohio, and beginning at the intersection of the westerly high bank of the Cuyahoga River, and the north line of Portage Street in the Village of Cuyahoga Falls, Summit County, Ohio; thence westerly along the north line of Portage Street 49½ feet; thence southerly across said Portage Street to the south line of same; thence easterly along the south line of said Portage Street 49½ feet to the said westerly high bank of the Cuyahoga River; thence southerly along the high bank of the Cuyahoga River on the westerly side thereof and following the meanderings of same, across Broad Street in said Village of Cuyahoga Falls, Summit County, Ohio, to the dividing line between the property of said Turner, Vaughn & Taylor Company and the property of the Walsh Paper Company; thence easterly across the Cuyahoga River to the southeast corner of the property of said Turner, Vaughn & Taylor Company on the easterly high bank of said Cuyahoga River; thence northerly along the high bank of said Cuyahoga River on the easterly side thereof and following the meanderings of same across Broad Street in said Village of Cuyahoga Falls, and across Portage Street also in said Village of Cuyahoga Falls, to the northerly line of said Portage Street; thence westerly along the north line of said street to the place of beginning. Contains approximately 6.3 acres more or less, with all the privileges, rights, easements, and appurtenances thereunto belonging.

The above property is owned, or claimed to be owned, by the Turner, Vaughn & Taylor Company.

Calvin M. Vaughn claims some ownership or interest in the above described property.

Also the following described real estate, to-wit: Situated in Cuyahoga Falls, Summit County, Ohio.

(Parcel No. 1): Beginning at the intersection of the center of the Cuyahoga River at the north side of Portage Street in the Village of Cuyahoga Falls, Summit County, Ohio; thence westerly along the north side of Portage Street to the intersection of the high bank of the west side of the Cuyahoga River and the north side of Portage Street; thence northerly along the said high bank on the westerly side of the Cuyahoga River to a point 30 feet north of the crest of the dam, as now located, of the Walsh Milling Company; thence easterly to the center of the Cuya-

River to a point approximately 30 feet north of the crest of said dam; thence southerly along the center of the Cuyahoga to the place of beginning. Containing approximately 0.5 with all the privileges, rights, easements, and appurtenances unto belonging.

arcel No. 2): Beginning at a point in the center of Prospect t in the Village of Cuyahoga Falls, Summit County, Ohio, on igh bank of the Cuyahoga River on the easterly side thereof; e westerly along the center of said Prospect Street to the high bank on the westerly side of said river; thence northerly along the high bank of said river to the north line of said C. M. Walsh's property where same joins the property of Valsh Paper Company; thence easterly, following the said north of C. M. Walsh's property across the Cuyahoga River to the bank on the easterly side of same; thence southerly along the bank of the easterly side of said Cuyahoga River to the place ginning. Containing 0.9 acres, more or less, with all the priv-, rights, easements, and appurtenances thereunto belonging.

e above property is owned, or claimed to be owned, by Cor-s M. Walsh. The Walsh Milling Company and The Falls Hol-Staybolt Company each claims some ownership or interest in bove described property.

o the following described real estate, to-wit: Situated in Cuya-Falls, Summit County, Ohio, and beginning at the intersec-f the westerly high bank of the Cuyahoga River in the Village yahoga Falls, Summit County, Ohio, and the dividing line be-the property of said Walsh Paper Company and the property of Turner, Vaughn & Taylor Company; thence southerly along the high bank of the Cuyahoga River on the westerly side thereof and following the meanderings of same, to the between the property of the said Walsh Paper Company and roperty of C. M. Walsh; thence easterly across the Cuyahoga to the southeast corner of the property of said Walsh Paper any, said corner being on the easterly high bank of said river; e northerly along the high bank of said river on the easterly hereof and following the meanderings of same to the southeast r of the property of Turner, Vaughn & Taylor Company, said r being also the dividing line between the property of Turner, hn & Taylor Company and the said Walsh Paper Company; e westerly across the Cuyahoga River to the place of beginning. ining approximately 0.8 acres, more or less, with all the priv-, easements, rights, and appurtenances thereunto belonging.

e above property is owned, or claimed to be owned, by the h Paper Company.

nelius M. Walsh claims some ownership or interest in the same.

Also the following described real estate, to-wit: Situated in Cuyahoga Falls, Summit County, Ohio.

arcel No. 1): Beginning at the point of intersection of the r of the Cuyahoga River and the north line of Portage Street, e Village of Cuyahoga Falls, Summit County, Ohio; thence

northerly along the center of said river to a point approximately 30 feet north of the crest of the Walsh Milling Company's dam, as now located; thence easterly to a point on the high bank of the Cuyahoga River on the easterly side thereof, said point being approximately 30 feet north of the crest of the aforesaid Walsh Milling Company's dam; thence southerly along the high bank on the easterly side of the Cuyahoga River to the north line of Portage Street; thence westerly along the north line of Portage Street to the place of beginning. Containing approximately 0.4 acres more or less, with all the privileges, rights, easements, and appurtenances thereunto belonging.

(Parcel No. 2): Beginning at a point on the westerly bank of the Cuyahoga River, said point being north 34 degrees 35′ east 380.16 feet, and north 32 degrees east 89.1 feet from a stone set in
280 the north line of Chestnut Street in the Village of Cuyahoga Falls, Summit County, Ohio, both of these lines belong along lines of land owned by the heirs of J. Millbank; thence in a line which passes through a recess which is cut into a large rock near the east edge of the water of the Cuyahoga River to receive the end of the timber of the "Chuckery" dam, and through a point on the west side of the gorge south of the husk or wheel house, which point is about 24 feet south of a mark cut in the perpendicular rock on said west side near the bottom by F. D. Paul and G. B. Turner, the east end of said line being on the top of the east bank of the river; thence north 31 degrees 45′ east 237.6 feet; thence north 10 degrees east 258.72 feet; thence north 14 degrees east 178.21 feet; thence north 80 degrees 45′ west 99 feet along the south line of the Cyrus Prentis tract. The west end of this line may also be found by beginning in the east line of Front Street 1.69 chains north 9 degrees 15′ east of the first angle in the east line of said Front Street south of Broad Street, and which line is also 21 links south of the center line of Prospect Street; thence along the easterly line of land belonging to Fannie S. Beebe to the southeasterly
281 corner of her land; thence along the southerly line of said Fannie S. Beebe's land one rod; thence in a southerly direction to a point one rod westerly from the place of beginning; thence one rod east to place of beginning. Containing approximately 1.5 acres, more or less, with all the privileges, rights, easements, and appurtenances thereunto belonging.

The above property is owned, or claimed to be owned, by the Falls Rivet & Machine Company.

Also the following described real estate, to-wit: Situated in Cuyahoga Falls, Summit County, Ohio, and being a piece of land on the west bank of the Cuyahoga River, bounded on the north by Bridge Street, on the east by the Cuyahoga River, on the south by land of S. Croy and on the west by land of Loomis, being 0.67 acres with the right of passage westerly to Front Street; with all the privileges, easements, rights, and appurtenances thereunto belonging.

The above property is owned, or claimed to be owned, by Hattie Adelle Fenton and Luna Alice Dover, tenants in common.

Fannie S. Beebe claims some ownership or interest or lien in said property, or some mortgage upon the same.

Also the following described real estate, to-wit: Situated in tage Township, Summit County, Ohio.

Parcel 1): Being a part of tract two in Portage Township, Sum- County, Ohio, and is a part of a tra-t of 120.79 acres of land marked and distinguished upon the map of the property sold er the decree in the case of John J. Palmer vs. The Portage Canal lanufacturing Company, et al, in the Court of Common Pleas, mmit County and State of Ohio, and being a part of a parcel of l now known as the George Sackett land and bounded as follows: ommencing at a point in the center of the Cuyahoga River at ntersection of the township line between Portage Township and Village of Cuyahoga Falls; thence northerly along said town- line 100 feet; thence following the northerly bank of said river westerly direction approximately 100 feet distant from the cen- of said river, and following the meanderings thereof to the west- line of said George Sackett property; thence southerly on the extreme westerly line of the said George Sackett property to a point 100 feet from the center of said river on the south- erly bank thereof; thence easterly along the southerly bank aid river, and following the meanderings thereof, approximately feet distant from the center thereof to the township line on the erly side of Portage Township; thence northerly along said town- line to the place of beginning; containing about ten acres, with the privileges, rights, easements, and appurtenances thereunto nging.

Parcel 2): Being a part of said tract two, Portage Township, nty and State as above, and being the water power of the Cuya- a River, and the rights, privileges, easements, and rights of way appurtenances attached to a tract of 97.40 acres of land in said t two, which tract includes the 55 acres above described and 40 acres of land lying westerly therefrom, which were reserved in eed from George Sackett and wife to Michael Metzler, Jr., re- ded in Vol. 101, page 205, Summit County Records, and consist- of the right to take and conduct the waters of the Cuyahoga er over and across said granted premises, at such times, and in such quantities, and in such manner, as he may choose.

(Parcel 3): Situate in the Township of Portage, County of Summit, and State of Ohio, and known as being the right privilege of using, controlling, diverting and conveying the ter power and water of the Cuyahoga River as the same now s or hereafter may flow over and across the lands owned by lliam J. Babb and Eliza K. Babb, his wife; L. S. Fowler and cretia M. Fowler, his wife; Jacob Schenck and Frederica Schenck, wife, on the 25th day of October, 1892, in tracts Nos. one, two, four of said Township of Portage. It being expressly under- od that none of the land of this aforesaid parcel shall be oc- pied or used for dams or other structures, and no land, except the e of that over which the waters of the said Cuyahoga River flow, d for the purposes aforesaid, intending hereby to acquire all the

lands, rights, interests, easements, and appurtenances conveyed to said George Sackett by the above mentioned parties by deed of date of Oct. 25th, 1892, and recorded in Vol. 184, page 191, of Summit County Records.

(Parcel 4): Situated in the Township of Portage, County and State aforesaid, and known as being a part of tract 4 in
285 said township, and bounded and described as follows: being a strip of land forty (40) feet in width beginning where the line fence between John Abele's land and Nolte's land intersects the tract line; thence southerly along the line of said Nolte to the Soap Works property and thence westerly along the line of said Soap Works property to the Cuyahoga River; together with the right to control, use, and divert the water of the Cuyahoga River flowing along, across or through the land of said Abele, to such uses or purposes and in such manner as the grantee, his heirs or assigns, may desire. The said strip of land containing about one and ¼ acres of land, with all the rights, privileges, easements, and appurtenances thereunto belonging.

The above parsel of land and the rights, privileges, easements, and appurtenances thereunto belonging includes all the rights, privileges, easements, and interests conveyed to the grantor by John Abele and Agatha Abele by deed dated April 3rd, 1901, and recorded in Vol. —, page —, of the Summit County Records, and the same is made subject to all the conditions of the aforesaid deed.
286 The above described property is owned, or claimed to be owned, by Fannie V. Sackett, sole heir of George Sackett, deceased.

Charles T. Grant claims the ownership or some interest in said property.

Also the following described real estate, to-wit: Situated in the City of Akron, Summit County, Ohio, and known as a part of tract No. 4 and also a part of 37.54 acres deeded to Edward Roepke by Joseph Babb by deed recorded in Summit County Records, Book 109, page 580. Beginning at a stake which may be found by commencing in the center of the public road and running north 34 degrees 45′ west about 273 feet along the east line of a private road 12 feet wide to a stake which is the beginning point of the land hereby conveyed; thence north 17 degrees 45′ east 240 feet to a stake; thence north 49 degrees 45′ west 180 feet to a stake; thence south 11 degrees 20′ west 200 feet to a stake; thence south 34 degrees 45′ east along east line of said private road 12 feet wide 180 feet to the beginning.

Also beginning at the same beginning point and running
287 south 17 degrees 45′ west 115 feet to the center of the Cuyahoga River; thence up the center of river north 24 degrees 15′ west 201.50 feet; thence north 11 degrees 20′ east 75 feet to the most westerly corner of the 1st described piece of land; thence south 34 degrees 45′ east 180 feet to the beginning, and containing 1.04 acres in both parcels. The private road herein mentioned is to be kept open for the use and benefit of Edward Roepke and The Akron

Company and said Roepke and those holding through or under

ie above described premises are also subject to the following itions contained in the conveyance from Edward Roepke and to The Akron Soap Company dated July 23rd, 1892, and re- d in Book 197, on page 289, of Summit County Records.

ie above described property is owned, or claimed to be owned, Henry A. Robinson.

aintiff says that the defendant, The American Mica, Mining & ng Company, is or was a corporation duly organized, and whose place of business was Cuyahoga Falls, Summit County, Ohio, and that it claims a lien or interest in the above described premises, or some part thereof, belonging, or claimed he Turner, Vaughn & Taylor Company.

ie Northern Ohio Traction & Light Company is a corporation organized and carrying on business in the City of Akron, State hio, whose chief place of business is in the City of Akron and of Ohio.

at the defendant, The Akron, Bedford & Cleveland Railroad pany, is a corporation duly organized (or was a corporation organized), whose chief place of business is in the City of n, Summit County, Ohio; and it claims a lien, ownership, or est in the above described property, or the portion thereof ed to be owned by Henry A. Everett and The Northern Ohio tion & Light Company.

at The Turner, Vaughn & Taylor Company is a corporation organized, whose place of business is in the Village of Cuya- Falls, Summit County, Ohio.

ie Walsh Paper Company is a corporation duly organized, whose of business is in the Village of Cuyahoga Falls, Summit County, Ohio.

The Falls Rivet & Machine Company is a corporation duly organized, whose place of business, and whose chief office, Cuyahoga Falls, Summit County, Ohio.

ie defendant Michael Metzler claims some ownership, interest, n in or upon the property hereinbefore described, and owned, or ed to be owned, by Fannie V. Sackett.

ie Central Trust Company of New York is a corporation duly nized and carrying on business in the City of New York; and ims some lien, ownership, or mortgage interest, either in itself trustee, in the premises heretofore described as belonging to y A. Everett, The Northern Ohio Traction & Light Company The Akron, Bedford & Cleveland Railroad Company.

ie Akron Traction & Electric Company is or was a corporation organized, whose chief place of doing business is in the City kron, Summit County, Ohio; and it claims a lien, interest, or gage interest in the premises heretofore described as belonging Henry A. Everett, The Northern Ohio Traction & Light Com- , and The Akron, Bedford & Cleveland Railroad Company.

290 The Dime Savings & Banking Company of Cleveland, Ohio, is a corporation duly organized, and whose chief offices and place of doing business are in the City of Cleveland, Cuyahoga County, Ohio; and it claims some ownership, interest, or mortgage interest in the premises above described as belonging to Henry A. Everett, The Akron, Bedford & Cleveland Railroad Company, and The Northern Ohio Traction & Light Company.

The Citizens Savings & Trust Company is a corporation duly organized, and whose office and place of doing business are in the City of Cleveland, Cuyahoga County, Ohio; and it claims some interest, lien, or mortgage interest in and to the premises heretofore described as belonging to Henry A. Everett, The Northern Ohio Traction & Light Company, and The Akron, Bedford & Cleveland Railroad Company.

The Northern Ohio Traction Company is or was a corporation duly organized, whose place of doing business was or is in the City of Akron, Summit County, Ohio; and it claims some interest, lien, ownership, or mortgage interest in and to the property heretofore described as belonging to Henry A. Everett, The Akron, Bed-
291 ford & Cleveland Railroad Company, and The Northern Ohio Traction & Light Company.

The Winton Motor Car Company is a corporation duly organized and doing business in the City of Cleveland, Ohio; and it claims a lien by reason of a certain judgment it claims or owns against Henry A. Robinson, against the premises heretofore described as belonging to said Henry A. Robinson.

The Hardware & Supply Company is a corporation duly organized, whose place of business is in the City of Akron, Summit County, Ohio; and it claims, by reason of a certain judgment against Henry A. Robinson, a lien on the premises above described as belonging to said Henry A. Robinson.

Plaintiff says that Augustus Smith and Fannie V. Sackett, as administrators of the estate of George Sackett, deceased, claim some interest, lien, or ownership in the premises heretofore described as belonging to, or claimed by, Fannie V. Sackett.

Plaintiff says that the defendant Josephine Everett is the wife of Henry A. Everett; and that she claims an inchoate right of dower in the premises above described as belonging to and
292 claimed by Henry A. Everett.

Plaintiff says that the defendant Ludie B. Robinson is the wife of Henry A. Robinson, and that she claims an inchoate right of dower in the above described premises owned or claimed by Henry A. Robinson.

Plaintiff says that Jennie M. Walsh is the wife of Cornelius M. Walsh, and that she claims an inchoate right of dower in the premises above described as belonging to Cornelius M. Walsh.

Plaintiff says that the above named defendants are all of the persons having any interest, legal or equitable, in the above described real estate, so far as same can be ascertained.

Plaintiff says that it is unable to agree with the owners of the above described parcels of real estate, each and all of them, as to

ne compensation to be paid them respectively for their said prop-rty.

Wherefore, Plaintiff asks that the said defendants heretofore amed claiming interests, liens, ownership, mortgages, or other interests in said premises, be required to set up answers set-93 ting forth their respective interests, ownership, or liens in the said premises, or be forever barred from asserting such liens, wnership, or interests respectively; Plaintiff asks further that such eps may be taken as are authorized by law whereby Plaintiff will e enabled to appropriate the above described real estate for the ses, objects, and purposes above stated, and such other and further elief as in the nature of the case may be required.

THE BIG CUYAHOGA LIGHT, HEAT & POWER CO.,
By WILLIS BACON AND G. M. ANDERSON,
Its Att'y's.

TATE OF OHIO,
Summit County, ss:

Willis Bacon, being first duly sworn, says that he is the attorney f The Big Cuyahoga Light, Heat & Power Company, and that the natters and things set forth in the above petition are, as he believes, rue.

WILLIS BACON.

94 Subscribed and sworn to before me by the said Willis Bacon this 4th day of June, A. D. 1908.

[NOTARIAL SEAL.] CHARLES J. CAREY,
Notary Public.

TATE OF OHIO,
Summit County, ss:

Willis Bacon, being first duly sworn, says that he is the agent nd one of the attorneys of the plaintiff, that the plaintiff is a cor-oration duly organized in the State of Ohio, that the facts and al-egations in the foregoing pleading are within the personal knowl-dge of the affiant, and that all of said facts and allegations are rue.

That this action and case is included in those enumerated in Section 5109 of the Revised Statutes of Ohio.

WILLIS BACON.

Sworn to before me and subscribed in my presence this 12th day f August, 1908.

[SEAL.] W. E. PARDEE,
Probate Judge.

295 THE STATE OF OHIO,
Summit County, ss:

In Probate Court.

THE BIG CUYAHOGA LIGHT, HEAT & POWER COMPANY, Plaintiff,
vs.
HENRY A. EVERETT et al., Defendant.

Præcipe.

To the Clerk:

Issue summons to the sheriff of Summit County, Ohio, for the following defendants in the above entitled action, and make the same returnable according to law: The Northern Ohio Traction & Light Company, The Akron, Bedford & Cleveland Railroad Company, The Turner, Vaughn & Taylor Company, Calvin M. Vaughn, The American Mica, Mining & Milling Company, Cornelius M. Walsh, The Walsh Milling Company, The Falls Hollow Staybolt Company, The Walsh Paper Company, The Falls Rivet & Machine Company, Hattie Adelle Fenton, Luna Alice Dover, Fan-
296 nie V. Sackett, Charles T. Grant, Michael Metzler, The Akron Traction & Electric Company, The Northern Ohio Traction Company, Henry A. Robinson, The Hardware & Supply Company, Augustus Smith and Fannie V. Sackett, administrators of the estate of George Sackett, deceased, Ludie B. Robinson, Jennie M. Walsh.

To the Sheriff of Lake County, Ohio, for the defendants Henry A. Everett and Josephine Everett.

To the Sheriff of Cuyahoga County, Ohio, for the defendants The Dime Savings & Banking Company of Cleveland, Ohio, and The Citizens' Saving & Trust Company of Cleveland, Ohio, and The Winton Motor Car Company.

To the Sheriff of Wayne County, Ohio, for the defendant Fannie S. Beebe, and make the same returnable according to law.

Endorse upon all summons, "Action for the appropriation of real estate to assess damages, and general relief."

THE BIG CUYAHOGA LIGHT, HEAT & POWER CO.,
By WILLIS BACON AND
G. M. ANDERSON, *Its Att'ys.*

297 Mr. Mather: We now offer in evidence The Charter of The Northern Ohio Traction & Light Company.

A true copy of said Charter of The Northern Ohio Traction and Light Company is hereto next attached and made a part hereof, see pages — to — hereof, both inclusive.

These Articles of Incorporation of the Northern Ohio Traction and Light Company.

Witness, that, we the undersigned, all of whom are citizens of the te of Ohio, desiring to form a corporation, for profit, under the eral corporation laws of said State, do hereby certify:

First. The name of said corporation shall be The Northern io Traction and Light Company.

Second. Said corporation is to be located at Akron, in Summit nty, Ohio, and its principal business there transacted.

Third. Said corporation is formed for the purpose of purchasing, uiring, building, extending, leasing, equipping, owning, operat- and maintaining street railroads, using other than animal er as a motive power for the transportation of passengers, pack- s, express matter, United States mail, baggage and freight, in streets, avenues, public ways and places in the City of Akron, mmit County, Ohio, in the Village of Barberton in said Summit nty, Ohio, in the Village of Cuyahoga Falls in said Summit nty, Ohio, in the Village of Doylestown in Wayne County, io, in the Village of Wadesworth in Medina County, Ohio, in Village of Ravenna in Portage County, Ohio, in the city of Cleveland in Cuyahoga County, Ohio, and in any or all other villages, cities or municipalities in said counties of Medina, Wayne, Summit, Portage and Cuyahoga and in any ll counties in the State of Ohio adjacent to said above mentioned nties or any of them, and in and upon any and all highways in d counties outside of the municipalities therein, and upon private hts of way in said counties, or either upon such highways or h private rights of way, and connecting by said street railroads or all of the cities, villages and municipalities in said counties, well as the street railroads in such cities, villages and municipali- with each other, to the end that said street railroads may be con- ucted, acquired, maintained and operated in or through such es, villages, municipalities and counties, or any of them, as a con- uous system of street railroad; and to appropriate, condemn, ac- re and own rights of way and necessary ground; and to do all ngs and have all powers, rights, franchises and privileges con- red upon corporations organized for the purpose herein stated, by the Laws of the State of Ohio, and in connection with the foregoing purposes, and, as incident thereto, the manufacturing and generating of electricity for light, heat and power.

Fourth. The Capital stock of said corporation shall be Ten ousand Dollars ($10,000.00), divided into one hundred (100) res of One Hundred Dollars ($100.00) each.

In witness whereof, we have hereunto set our hands this 12th of November, A. D. 1902.

J. R. NUTT.
W. B. WHITING.
H. J. CRAWFORD.
C. E. SANDERS.
VIRGIL J. TERRELL.

301 THE STATE OF OHIO,
County of Cuyahoga, ss:

Personally appeared before me, the undersigned, a Notary Public in and for said County, this 12th day of November, A. D. 1902, the above named J. R. Nutt, W. B. Whiting, H. J. Crawford, C. E. Sanders and Vergil J. Terrell, who each severally acknowledged the signing of the foregoing articles of incorporation to be his free act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year last aforesaid.

[SEAL.] A. J. SPERRY,
Notary Public.

THE STATE OF OHIO,
County of Cuyahoga, ss:

I, William R. Coates, Clerk of the Court of Common Pleas within and for the County aforesaid, do hereby certify that A. J. Sperry, whose name is subscribed to the foregoing acknowledgement as a Notary Public, was at the date thereof a Notary Public in and for said County, duly commissioned and qualified, and authorized as such to take said acknowledgement, and, further, that I am well acquainted with his handwriting, and believe that the signature to said acknowledgement is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at Cleveland, Ohio, this 13th day of November, A. D. 1902.

[SEAL.] WILLIAM R. COATES, *Clerk.*

302 UNITED STATES OF AMERICA,
State of Ohio:

Office of the Secretary of State.

I, Lewis C. Laylin, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation of "The Northern Ohio Traction and Light Company," filed in this office on the 24th day of November, A. D. 1902, and recorded in Volume 93 Page 379, of the Records of Incorporations.

Witness my hand and Official Seal, at Columbus, this 24th day of November, A. D. 1902.

[SEAL.] LEWIS C. LAYLIN,
Secretary of State.

303 Mr. Nesbit: We now offer in evidence Defendant's exhibit L.

A true copy of said plaintiff's exhibit L. is hereto next annexed and made a part hereof. See pages — to — hereof both inclusive.

04 DEFENDANT'S EXHIBIT L.

Report on Millbank Water Power.

CUYAHOGA FALLS, OHIO, Nov. 24, 1897.

r. George Paul, Chief Engineer, A. B. C. R. R., Cuyahoga Falls, O.

DEAR SIR: You have asked us to submit for your consideration an timate of the amount and cost of development of the water power the Cuyahoga River at the site of the Millbank property, in Sum-it County, Ohio.

In response thereto, we submit the following:

On November 23rd and 24th, the writer made a general examina-on of the property, and this examination, in connection with data pplied by yourself, Supt. Sloat, and the testimony of owners of ower above, the Millbank property, will form a basis of the state-ents embodied below.

Drainage Basin.

The area drained by the Cuyahoga River, above the Millbank roperty, and available for the supply at that point, is practically 300 quare miles.

Volume of Water.

The determinations upon this important factor have of necessity be based upon the testimony of present users of water just above ou, the present stage of the River being so large that an actual nage of the stream would not be a reliable indication of its low ater capacity.

I interviewed the Falls Rivet Co., and Mr. J. W. Walsh of The Falsh Bros. Paper Co., and find that their representations of the low water capacity of the stream practically agree.

05 Mr. Walsh from his books, demonstrated that during the lowest period of last year, that for four months the supply was fficient to furnish the water for one 35 inch Samson wheel, under 9 foot head.

This would indicate that last year the low water capacity for four nonths of the dry season, was 5,300 cubic feet per minute.

The amount of water used during this same period by Howe and he Falls Rivet Co., would indicate a smaller low water capacity.

The precipitation upon the drainage basin for the last twenty-five ears, as shown by the report furnished me by you, and from the ecords of Mr. George Pine, and covering a period of twenty-five ears, prior to '97, indicate a probability that the volume of water ischarged by the Cuyahoga during the low period, is well sustained.

The drainage basin, however, appeals to the writer as being too mall for so large a supply as 5,300 cubic feet per minute, and I have, herefore, established a low water capacity of 4,000 cubic feet per inute as the basis of estimate during the dry period.

From estimates of amount of water discharged at this time, based

upon the depth of the water on the Munroe dam, and corroborated by the amount of water discharged through the wheels on the Walsh property, I estimate, the present discharge of the River at 15,000 cubic feet per minute.

The different users of water at Cuyahoga Falls, seem to be uniform in their statements, to the effect that, the present capacity of
306 the stream was sustained for at least nine months of the year.

I have, however, thought best to use a capacity of 10,000 cubic feet per minute, for a period of eight months during each year.

Available Head.

I am advised by you that the total fall of the River on the Millbank property is practically 103 feet, and will, therefore, use 100 feet as a working head in the determination of the aggregate powers.

Plan of Power Proposed.

The conditions existing upon this property would suggest that the most economical creation of the full power would require the building of a masonry dam at Big Falls. Assuming the elevation of the water at the lower end of your property to be 0, the elevation of the crest of the dam according to your data, would be elevation 52.

We would recommend that the dam be located at a point approximately 75 feet above the brow of the Big Falls, the exact location being determined upon a closer examination of the River bed.

We would recommend that the water be conveyed from the dam to the Power house through a steel conduit, the conduit originating at the base of the dam and running along the South Bank of the River to the power station site.

We would recommend that the conduit enter the power station at approximately elevation 20, the last 20 feet of head being operated in the draft tubes of the wheels.

307 We would advise, providing the Spillway of the dam of 140 feet, and that the abutments should have a rise of eight feet above the crest of the dam. The abutments should be built of masonry, and the South abutment, acting as a forebay, should be provided with suitable water racks and controlling gate.

At the Power-Station, we have estimated upon, and would have the building to be of brick founded on substantial masonry foundations.

We would recommend that the low water capacity of the stream be developed in one unit, and that the power developed by the 6,000 cubic feet of water for eight months, be developed in two units, and that the generators all be direct connected to the Jack-shafts of Horizontal wheel.

The Exciters should have independent power and be directly connected. We do not understand that you ask at this time for any further description of the electrical or hydraulic machinery in the power house.

The Amount of Power.

the following mention of the amount of power, the net H. P. be spoken of at the point of creation. The Station readings shed by Mr. Sloat indicate an average service of 21 hours, and vailable H. P. will be based upon 21 hours runs.

sed upon 4,000 cubic feet per minute and 100 feet working head, ow water capacity of the plant as above described, would be 691 H. P. on the Jack-shaft of the wheel for 23 hours.

The use of this power at Akron, Cuyahoga Falls, and Bedford, should be practical at a loss of not to exceed 12½ per in the generators, line and transformers, thereby delivering e Station motors 603 H. P. for 21 hours, during the four months ater period.

sed upon 10,000 cubic feet of water per minute for eight months, 21 hour service, and the use of the surplus power at Cleveland total transmission of 35 miles, we have the following result. total surplus power delivered to the Jack-shaft of the wheels, l be 1037 H. P., and figuring on the basis of a loss of 17½ per in transmission you would have a total of 856 H. P. delivered e motors at Cleveland, for 21 hours service. In the estimate of or the electrical apparatus below, I have assumed a voltage of 0 for the 35 miles transmission, and a voltage of 5,000 for an ge transmission of 7½ miles, assuming that 1/3 of the low capacity, *i. e.*, 201 H. P. is used at each of the Power Stations, kron, Cuyahoga Falls and Bedford. It is not probable that the disposal of the low water capacity of the stream is exactly as would use it, but in the absence of definite data upon this subthe above disposition is taken as a basis for estimate.

Estimate of Costs.

e following estimate of costs provides for the material and labor sary for the development of 603 electrical H. P. during the low period, and 856 electrical H. P. during eight months of the delivered at motors as above indicated.

.....	$70,000.00
conduit	28,000.00
r house and hydraulic machinery	15,500.00
rical apparatus, including line, generators, step and step down transformers per delivery of 856 P. at Cleveland	39,000.00
rical apparatus, including line, generators, step and step down transformers, for the delivery of 3 H. P. as above indicated.....	16,000.00
neering and incidentals	15,000.00
	$183,500.00

We estimate the cost of operation on the above plant to be as follows:

Interest on $183,000.00 at 6%	$11,010.00
Station help and expenses	5,800.00
Taxes	2,000.00
Depreciation on machinery	2,000.00
Total	$20,810.00

On the basis of 856 net electrical H. P. for 21 hours per diem for 240 days plus 603 net electrical H. P. for 21 hours per diem for 365 days, we have a total per annum efficiency of the power of 8,936,235 H. P. hours, which reduced to Kilowatt Hours becomes 6,619,000 Kilowatt hours.

Dividing the annual expense of the plant, *i. e.* 20,810 dollars, by the number of Kilowatt hours of power, we have as the cost
310 of the power per Kilowatt hour, $.00314. I understand from Mr. Sloat that the present cost of power per Kilowatt hour is, approximately, $.0111 or, approximately 200% more than the above estimated cost by water power.

You will notice that the above estimate of cost of the water power development *are* based upon a full consumption of the power developed.

General.

In addition to the amount of power above estimated it is probable that for a period of five months of the year a considerable increase in the above quantities could be taken from the dam, but, as the duration of the extra service is so short, have refrained from its estimation.

In conclusion we desire to say that, in our opinion the above estimates will provide for a first class construction throughout and for a structure having a minimum maintenance cost. The building of the above works upon careful lines dictated by the best engineering practice should deliver to you construction free from all ordinanry hazards.

Thanking you for the courtesies received at your hands, we are,

Yours very truly,

THE STILWELL-BIERCE & SMITH-VAILE CO.,
Dayton, Ohio, U. S. A.

——— ———,
Ass't Engineer.

311 Ad-enda.

I might also add that the U. S. Government *guage* of the low water capacity of the Cuyahoga River at Cuyhoga Falls, is 5,296 cubic feet per minute, which you will notice compares favorably with the claims of Walsh and the Rivet Co. This would seem to be a further

pport for the conservatism of 4,000 cubic feet per minute used in
e foregoing estimate.

12 Mr. Mather: We now offer in evidence the Deed of The Northern Realty Company to The Northern Ohio Power Company dated January 31st, 1911 and found in volume 383 at page 06 Summit County records of deeds.

A true copy of said deed is hereto next annexed and made a part ereof at pages — to — hereof both inclusive.

13 *Deed.*

No. 35475.

The Northern Realty Co. to The Northern Ohio Power Co.

Know all men by these presents, That the Northern Realty Company, a corporation organized and existing under the laws of Ohio, e Grantor, for the Consideration of One Dollar ($1.00) and other od and valuable considerations received to its full satisfaction of he Northern Ohio Power Company, also a corporation organized d existing under and by virtue of the laws of Ohio, the Grantee, es Give, Grant, Bargain, Sell and Convey unto the said Grantee, successors and assigns, the following described premises:

First Parcel. All that tract or parcel of land situate, lying and ing in the township of Portage and in the village of Cuyahoga lls, township of Cuyahoga Falls, county of Summit and State Ohio, known as being part of tract No. 2, formerly all in said wnship of Portage and described as follows:

Beginning at an iron pin set on the island at the northwest corner of Lot number 6 Tract number 3 of Portage Township,
4 and at the southeast corner of a tract of land containing 105.83 acres which was deeded by Seth Day and Wife to The rtage Canal and Manufacturing Company, August 6th, 1838; ence north 1 degree 20′ east 1315 feet along the east line of said 5.83 acre tract to a stone pipe at the northeast corner of said 5.83 acre tract; thence north 88 degrees 30′ west 3405.60 feet ng the north line of said 105.83 acre tract to a hard head stone the northwest corner of said 105.83 acre tract; thence south 0 grees 30′ west 760 feet along the west line of said 105.83 acre act, and which is the west line of Cuyahoga Falls Township, and e same continued, to a stone pipe; thence south 87 degrees 38′ st 673 feet to an iron pin which is set 627 feet north of the northst corner of lot 3 Tract 3 Portage Township; thence north 89 grees 38′ east 1354.30 feet to a stone which is set 660 feet north the northeast corner of Lot 4 Tract 3 Portage Township; thence st 410.50 feet to a yellow oak tree 24 inches in diameter thence uth 78 degrees 15′ east 270.60 feet to a yellow oak tree; thence south 8 degrees 15′ east 108.90 feet to a marked stone; thence
5 south 45 degrees 40′ east 99 feet to a marked white oak tree; thence south 3 degrees 45′ east 170 feet to a stone; thence

south 46 degrees east 99 feet to a marked white oak tree; thence south 31 degrees east 112.80 feet to a marked black oak tree; thence south 26 degrees east 97.60 feet to a black oak tree; thence north 85 degrees 30′ east 408 feet along the north line of Lot 5 Tract 3 Portage Township to the beginning, and containing 66.03 acres of land, courses magnetical of the year 1879.

Second Parcel. Also all that certain tract or parcel of land situate, lying and being in the said township of Portage, known as being part of lot number 5 in Tract number 3, and described as follows:

Beginning at an iron pin set on the island of the northeast corner of said Lot 5; thence south 2 degrees west along the east line of said Lot 5, 944.46 feet; thence running northerly parallel to and 50 feet from the northerly face of the retaining wall of what is known as the Chuckery Race, the following courses and distances, north 47 degrees 30′ west 125.40 feet; north 33 degrees
316 15′ west 112.20 feet; north 15 degrees west 237.60 feet; north 0 degrees 45′ west 191.40 feet; north 11 degrees 30′ west 105.60 feet; north 18 degrees 30′ west 132 feet; north 26 degrees 30′ west 99 feet to the north line of Lot 5; thence along Lot line north 86 degrees east 351.78 feet to the beginning, and containing 4.50 acres of land, Courses magnetical as surveyed April 15, 1880.

Third Parcel. Also all that certain tract or parcel of land situate, lying and being in said Township of Portage, known as being part of Lot number 6 in tract number 3, and described as follows:

Beginning at the northeast corner of said lot at a marked hemlock tree standing near the north bank of the Cuyahoga River; thence north 88 degrees west 1341.10 feet along the south line of land belonging to H. C. Grant to an iron pin set on an island in the Cuyahoga River at the northwest corner of said Lot 6; thence south 1 degree 45′ west 2012.30 feet along the west line of said lot number 6 to an iron pin set in the center line of the old Akron and Cuyahoga Falls Road; thence north 66 degrees 30′ east
317 216.48 feet along said road center to an iron pin; thence north 52 degrees 15′ east 844.14 feet along said road center to an iron pin; thence north 41 degrees 30′ east 217.14 feet along said road center to an iron pin; thence north 45 degrees 30′ east 135.96 feet along said road center to an iron pin; thence north 31 degrees 30′ east along road center 160.38 feet to an iron pin; thence north 51 degrees 30′ east along road center 231 feet to an iron pin; thence north 48 degrees east 23.10 feet along road center to an iron pin set in the east line of said lot; thence north 2 degrees 12′ east 810 feet along the east line of said Lot 6 to the beginning, and containing 45.68 acres of land, courses magnetical of the year 1879.

Fourth Parcel. And also all that certain tract or parcel of land situate, lying and being in the said village and township of Cuyahoga Falls, known as being a part of tract number 1, formerly in the township of Tallmadge, and described as follows: Beginning at an iron pin set at the northwest corner of Tract number five; thence north 2 degrees 12′ east 763.6 feet along what was formerly the west

line of Tallmadge Township to a stone pipe (this line crosses
318 the Cuyahoga River) which stone pipe is set at a point 612 feet south measuring along said Township line from the point where said Township line intersects the center line of the County road, recorded as County View number 218; thence from said stone pipe along a line which is one rod west of the high bank of the Cuyahoga River the following courses and distances, north 34 degrees 35′ east 264 feet; north 27 degrees 35′ east 286.44 feet; north 2 degree 30′ west 116.16 feet; north 24 degrees 10′ west 138 feet; north 8 degrees 40′ east 107.60 feet; north 19 degrees 31′ east 108.24 feet; north 36 degrees 40′ east 168.30 feet; north 53 degrees 40′ east 454.70 feet; and north 35 degrees east 280.70 feet to a stone pipe set in Thomas Patterson's north line; thence leaving said one rod line, north 63 degrees 10′ west along Thomas Patterson's north line 85.14 feet to the east line of Front street and to a stone pipe; thence north 32 degrees 40′ east 640 feet along the east line of Front street to a stone pipe to an angle in east line of said street; thence north 26 degrees 20′ east 268 feet along east line of Front street to a stone pipe; thence
319 south 63 degrees 40′ east 139.12 feet along the south line of tract of land containing one and 43/100 acres of land conveyed by Jeremiah Milbank to John Hinde on the 14th day of October 1879, and which line is in a continuation of the south line of Chestnut street; thence north 34 degrees 35′ east 380.16 feet along the east line of said 1.43 acres piece of land to its north east corner; thence north 32 degrees east 8910 feet (this line is on top of a perpendicular bank on the west side of the Cuyahoga River and is also along the east line of the Falls Rivet and Machine Company); thence south 75 degrees east 157 feet on a line of land of said company to a point which is on top of the perpendicular bank on said east side of said river; thence south 23 degrees west 118.80 feet on a line which is on top of said east bank; thence south 63 degrees east 52 feet to the west line of Water Street where an iron grate bar is set; thence south 22 degrees 30′ west 660 feet along the west side of Water street to an iron pin; thence south 17 degrees 30′ west 665.34 feet along the west side of said Water street to an iron pin; thence north
320 63 degrees 37′ west 128.04 feet along north line of land formerly belonging to C. S. Sill to an iron pin; thence south 31 degrees 30′ west 317.46 feet along the west line of same land to an iron pin; thence south 41 degrees 30′ west 341.88 feet along west line of same land to an iron pin; thence south 78 degrees 30′ east 289.74 feet along south line of same land to an iron pin; thence south 30 degrees 30′ west 824.34 feet to an iron pin; thence north 81 degrees west 69.96 feet along the north line of land belonging to William Walsh to an iron pin; thence south 31 degrees 30′ west 820.40 feet along west line of land belonging to William Walsh to an iron pin; thence south 87 degrees 30′ west 66 feet; thence south 29 degrees 30′ west 144.50 feet; thence north 87 degrees 30′ west 258.72 feet along the north line of tract 5 to the beginning, and containing 43.68 acres of land, courses magnetical for the year

1879. Subject to the rights of the Cleveland, Akron and Columbus Railroad Company.

Be all the aforesaid courses and distances more or less.

Also all water power and milling rights belonging to the
321 said premises, excepting such as may have been conveyed by Jeremiah Milbank.

And all the estate, title and interest of the said parties of the first part either in law or in equity, of, in and to the said premises, and also all the estate, title and interest of the said parties of the first part, of, in and to any and all other real property in said townships of Portage and Cuyahoga Falls, of which Jeremiah Milbank died seized, together with all the right, privileges and appurtenances to the same belonging and all the rents, issues and profits thereof.

Said first, second, third and fourth parcels being the same premises as those conveyed by Elizabeth M. Anderson and Joseph Milbank as executrix and executor of the Estate of Jeremiah Milbank, deceased, to Henry A. Everett by deed dated December 14, 1897, and recorded in Vol. 233, Page 447, of the Summit County Ohio, Records of Deeds, be the same more or less, but subject to all legal highways.

To Have and to Hold the above granted and bargained
322 premises with the appurtenances thereof, unto the said grantee, its successors and assigns forever.

And the said grantor does for it and its successors and assigns, covenant with the said grantee, its successors and assigns, that at and until the ensealing of these presents, it was well seized of the above described premises, as a good and indefeasible estate in fee simple, and have a good right to bargain and sell the same in manner and form as above written, and that the same are free from all encumbrances whatsoever, and that it will Warrant and Defend said premises, with the appurtenances thereunto belonging, to the said Grantee, its successors and assigns, against all lawful claims and demands whatsoever.

In Testimony Whereof, said Grantor, The Northern Realty Company, has caused its corporate seal to be hereto affixed, and these presents to be hereto subscribed by its President and Secretary, this 31st day of January, A. D. 1911.

THE NORTHERN OHIO REALTY CO.
By WILL CHRISTY, *President.*
323 CHARLES LAHR, *Secretary.*

Sealed and delivered in presence of—
CHARLES H. HOWLAND.
N. O. MATHER.

THE STATE OF OHIO,
Summit County, ss:

I, N. O. Mather, a notary public in and for the said County, do hereby certify that Will Christy, President of the Northern Ohio Realty Company, and Charles Lahr Secretary of said Company, whose names respectively are signed to the foregoing instrument,

ing date on the 31st day of January, A. D. 1911, have this day
nowledged the signing and execution of the said instrument for
nselves respectively and for and on behalf of said The Northern
ty Company and acknowledged that they have affixed the cor-
te seal of said Company to said instrument, and otherwise exe-
d the same by direction of a resolution of the Directors of said
pany, and have acknowledged that the same in all respects is
r free act and deed as such officers respectively and the free act
and deed of said corporation for the purposes and uses therein
set forth. And I further certify that said Will Christy and
Charles Lahr are known to me to be the individuals and
ers described in and who executed the said instrument.
n Testimony Whereof, I hereunto set my hand and official seal
kron, Ohio, this 31 day of January, A. D. 1911.
[SEAL.] N. O. MATHER,
Notary Public.

ransferred, Feb. 2nd 1911.
eceived for record, Feb. 2nd 1911 at 10.15 A. M.
ecorded Feb. 13th 1911.
ee $3.20.
JAMES BROWN, *Recorder.*

Mr. Mather: We now offer in evidence the deed of The Northern Ohio Power Company to The Northern Ohio Trac- & Light Company dated the 24th day of February 1914. Found Volume — page — of Summit County records of deeds.

Mr. Frank: We object to that.
The Court: How is that competent?
Mr. Mather: Simply as tending to show and prove the trust
aracter of this property all the way through in The Northern
o Traction & Light Company. All of the original holders of this
perty were trustees for The Northern Ohio Traction & Light
pany and finally conveyed it to that company.
The Court: I don't think that makes any difference. I'll sustain
objection. Defendant excepts.

true copy of said deed is hereto next annexed and made a part
of at pages — to — hereof both inclusive.

Know All Men by These Presents that The Northern Ohio Power Company, a corporation duly organized and existing
er and by virtue of the laws of the State of Ohio the grantor, in
ideration of One (1.00) Dollar and other good and valuable
ideration to it paid by The Northern Ohio Traction & Light
pany, a corporation duly organized under and by virtue of the
of the State of Ohio, the Grantee, the receipt of which is hereby
nowledged, does hereby grant, bargain, sell and convey unto the
Grantee, its successors and assigns forever, the following de-
ed real property Situated in the County of Summit and State of
o, and more particularly described as follows, to wit:

327 Parcel #1.

All that tract or parcel of land, situated, lying and being in the Township of Portage and in the Village of Cuyahoga Falls, Township of Cuyahoga Falls, County of Summit and State of Ohio, known as being part of Tract #2, formerly all in said Township of Portage, and described as follows:

Beginning at an iron pin set on the island at the Northwest corner of Lot #6, Tract #3 of Portage Township, and at the Southeast corner of a tract of land containing 105.83 acres which was deeded by Seth Day and Wife to the Portage Canal and Manufacturing Company, August 6, 1838: thence North 1° 20′ East 1315 feet along the East line of said 105.83 acre tract to a stone pipe at the Northeast corner of said 105.83 acre tract: thence North 88° 30′ West 3405.60 feet along the North line of said 105.83 acre tract to a hard head stone at the Northwest corner of said 105.83 acre tract: thence South 0° 30′ West 760 feet along the West line of said 105.83 acre tract, and which is the West line of Cuyahoga Falls Township and the same continued, to a stone pipe: thence South 87° 38′
328 East 673 feet to an iron pin which is set 627 feet North of the Northeast corner of Lot #3, Tract #3 Portage Township: thence North 89° 38′ East 1354.30 feet to a stone which is set 660 feet North of the Northeast corner of Lot #4, Tract #3, Portage Township: thence East 410.50 feet to a yellow oak tree 24 inches in diameter: thence South 78° 15′ East 270.60 feet to a yellow oak tree: thence South 8° 15′ East 108.90 feet to a marked stone: thence South 45° 40′ East 99 feet to a marked white oak tree: thence South 3° 45′ East 170 feet to a stone: thence South 46° East 99 feet to a marked white oak tree: thence South 31° East 112.80 feet to a marked black oak tree: thence South 26° East 97.60 feet to a black oak tree: thence North 85° 30′ East 408 feet along the North line of Lot #5 Tract #3 Portage Township to the beginning and containing 66.03 acres of land courses magnetical of the year 1879.

Parcel #2.

Also all that certain tract or parcel of land situated, lying and being in the said Township of Portage known as being part
329 of lot #5, in Tract #3, and described as follows:

Beginning at an iron pin set on the island at the Northeast corner of said Lot #5: thence South 2° West along the East line of said Lot #5 944.46 feet: thence running Northerly parallel to and 50 feet from the Northerly face of the retaining wall of what is known as the Chuchery Race, the following courses and distances: North 47° 30′ West 125.40 feet: North 33° 15′ West 112.20 feet North 15° West 237.60 feet: North 0° 45′ West 191.40 feet North 11° 30′ West 105.60 feet: North 18° 30′ West 132 feet: North 26° 30′ West 99 feet to the North line of Lot #5: thence along Lot line North 86° East 351.78 feet to the beginning, and containing 4.50 acres of land Courses magnetical as surveyed April 15, 1880.

Parcel #3.

Also all that certain tract or parcel of land situated, lying and being in said Township of Portage, known as being part of
330 Lot #6 in Tract #3 and described as follows:

Beginning at the Northeast corner of said Lot at a marked hemlock tree standing near the North bank of the Cuyahoga River; Thence North 88° West 1341.10 along the South line of land belonging to H. C. Grant to an iron pin set on an island in the Cuyahoga River at the Northwest corner of said Lot #6; thence South 1° 45′ West 2012.30 feet along the West line of said lot #6 to an iron pin set in the center line of the old Akron and Cuyahoga Falls Road; thence North 66° 30′ East 216.48 feet along said road center to an iron pin; thence North 52 degrees 15′ East 844.14 feet along said road center to an iron pin; thence North 41° 30′ East 217.14 feet along said road center to an iron pin; thence North 45° 30′ East 135.96 feet along said road center to an iron pin; thence North 31° 30′ East along road center 160.38 feet to an iron pin; thence North 51° 30′ East along center 231 feet to an iron pin; thence North 48 degrees east 23.10 feet along road center to an iron pin set in the East line of said Lot thence North 2° 12′ East 810 feet
331 along the East line of said Lot #6 to the beginning, and containing 45.68 acres of land, courses magnetical of the year 1879.

Excepting from the above described parcel #3, about 3.29 acres conveyed by The Northern Ohio Power Company to the Board of County Commissioners of Summit County by deed dated Dec. 29, 1911 and recorded in Summit County records of deeds Book 434, Page 16.

Parcel #4.

And also all that certain tract or parcel of land situated, lying and being in the said Village and Township of Cuyahoga Falls, known as being a part of Tract #1, formerly in the Township of Tallmadge, and described as follows:—

Beginning at an iron pin set at the Northwest corner of Tract #5; thence North 2° 12′ East 763.6 feet along what was formerly the West line of Tallmadge Township to a stone pipe (this line crosses the Cuyahoga River) which stone pipe is set at a point 612 feet South measuring along said Township line from the point
332 where said Township line intersects the center line of the County road; recorded as County View #218; thence from said stone pipe along a line which is one rod west of the high bank of the Cuyahoga River the following courses and distances, North 34° 35′ East 264 feet; North 27° 35′ East 286.44 feet. North 2° 30′ West 116.16 feet; North 24° 10′ West 138 feet; North 8° 40′ East 107.60 feet; North 19° 31′ East 108.24 feet; North 36° 40′ East 168.30 feet; North 53° 40′ East 454.70 feet; and North 35° East 280.70 feet to a stone pipe set in Thomas Patterson's North line; thence leaving said one rod line North 63° 10′ West along

Thomas Patterson's North line 85.14 feet to the East line of Front street and to a stone pipe; thence North 32° 40′ East 640 feet along the East line of Front street to a stone pipe to an angle in East line of said street; thence North 26° 20′ East 268 feet along East line of Front street to a stone pipe; thence South 63° 40′ East 139.12 feet along the south line of tract of land containing one and 43/100 acres of land conveyed by Jeremiah Milbank to John Hinde
333 on the 14th. day of October 1879, and which line is in a continuation of the South line of Chestnut Street; thence North 34° 35′ East 380.16 feet along the East line of said 143 acre piece of land to its Northeast corner; thence 32° East 39.10 feet (this line is on top of a perpendicular bank on the West side of the Cuyahoga River, and is also along the East line of the Falls Rivet and Machine Company); thence South 75° East 157 feet on a line of land of said Company to a point which is on top of the perpendicular bank on said East side of Said River; thence South 23° West 118.80 feet on a line which is on top of said East bank; thence South 63 degrees East 52 feet to the West line of Water street where an iron grate bar is set; thence South 22° 30′ West 660 feet along the West side of Water street to an iron pin; thence South 17° 30′ West 665.34 feet along the west side of said Water street to an iron pin; thence North 63° 37′ West 128.04 feet along North line of land formerly belonging to C. H. Sill to an iron pin; thence
334 South 31° 30′ West 317.46 feet along the West line of said land to an iron pin; thence South 41° 30′ West 341.88 feet along West line of same land to an iron pin; thence South 78° 30′ East 289.74 feet along South line of same land to an iron pin; thence South 30° 30′ West 824.34 feet to an iron pin; thence North 81° West 69.96 feet along the North line of land belonging to William Walsh to an iron pin; thence South 31° 30′ West 820.40 feet along West line of land belonging to William Walsh to an iron pin; thence South 87° 30′ West 66 feet; thence South 29° 30′ West 144.50 feet; thence North 87° 30′ West 63 feet; thence South 29° 30′ West 144.50 feet; thence North 87° 30′ West 258.72 feet along the North line of tract #5 to the beginning and containing 43.68 acres of land, courses magnetical for the year 1879. Subject to the rights of the Cleveland, Akron & Columbus Railroad Company.

Be all the aforesaid courses and distances more or less.

Also all water power and milling rights belonging to the
335 said premises, excepting such as may have been conveyed by Jeremiah Milbank and all the estate, title and interest of the said parties of the first part either in law or in equity of in and to the said premises, and also all the estate, title and interest of the said parties of the first part, of in and to any and all other real property in said townships of Portage and Cuyahoga Falls, of which Jeremiah Milbank died seized together with all the right, privileges and appurtenances to the same belonging and all the rents, issue and profits thereof.

Said first, second, third, fourth parcels being the same premises as those conveyed by Elizabeth M. Anderson and Joseph Milbank as executrix and executor of the Estate of Jeremiah Milbank, de-

ased, to Henry A. Everett by deed dated Dec. 14, 1897 and recorded Vol. 223, Page 447 of Summit County, Ohio, Records of Deeds.

Parcel #5.

Situated in the Village of Cuyahoga Falls, County of Summit, and State of Ohio, and known as part of Tract #2 formerly
36 in Portage Township, beginning at a sewer pipe in the old township line 572 feet Southerly from a sewer pipe set in the enter of Front street at the intersection of the said Township line ith said Street center; thence South along Township line and West ne of lands now owned by The Northern Realty Company 334 eet to the Southeast corner of lands owned by H. C. Grant and arah M. Grant; thence Westerly along the North line of land now r formerly owned by the Northern Realty Company 390.5 feet to sewer pipe which is 452 feet from a sewer pipe set in the Southerly ide on line of Front street and set in the line between land owned y H. C. Grant and Sarah M. Grant and the Northern Realty Com- any; thence North 53° 09′ East 511.2 feet to the beginning con- aining one and one half acres of land (1.50).

Said parcel being the same premises as those conveyed by H. C. Grant and Sarah M. Grant, his Wife to Henry A. Everett by deed lated June 31, 1898, and recorded in Vol. 259, Page 13 of Summit County, Records of Deeds, be the same more or less, but
37 subject to all legal highways.

Parcel #6.

Situated in the Township of Portage, County of Summit, and State of Ohio and known as being in tract #2 Portage Township, beginning at an iron pin in center of the Cuyahoga River and the West line of land of Ther Northern Ohio Power Company, and Grantor's East line; then South 3° 30′ West on Grantor's East line 150 feet to an iron pin. This pin is 731.7 feet Northerly from the South line of Tract #2; thence North 86° 30′ West 150 feet to an iron pin; thence North 3° 30′ East 150 feet to an iron pin; thence South 86° 30′ East 150 feet to the beginning, containing .52 acres.

This parcel is subject to the condition of a certain deed given by Fanny V. Sockitt to The Northern Ohio Power Co., dated July 18, 1911 and recorded in Book 417, Page 374, Summit County Records of deeds.

Parcel #7.

Situated in the Township of Portage, County of Summit,
38 State of Ohio, and known as being a part of lot #5 in Tract #3.

Beginning at a stone on the East line of said Lot #5 944.46 feet South of the Northeast corner of said Lot #5; thence North 43° 08′ West 39.10 feet to a stake; thence North 45° 40′ West 86.90 feet to

a stake; thence North 34° 03′ West 103.20 feet to a stake; thence North 14° 18′ West 268.40 feet to a stake; thence North 0° 47′ East 191.90 feet to a stake; thence North 9° 39′ West 108.10 feet to a stake; thence North 16° 48′ West 130.60 feet to a stake; thence North 27° 17′ West 101.30 feet to a stake on the North line of Tract #3; thence North 88° West on said tract line 82.40 feet to a stone at the intersection of the North line of Tract #3 with the Easterly line of Riverside Boulevard; thence South 24° 15′ East on the Easterly line of said River side Boulevard 65.40 feet to a stake; thence South 17° 26′ East on said River side Boulevard 56.10 feet to a stage; thence South 15° East on said River side Boulevard 869.80 feet to a stone; thence East 124.00 feet to the beginning containing 1,269 acres of land.

The Easterly line- of the above piece are 50.00 feet West-
339 erly and parallel to the Easterly edge of the walls of the so-called Chuckery Race.

The above parcel #7 is the same premises as conveyed to the Northern Ohio Power Company by Lucy E. Brodback, by deed recorded in Book 430, Page 489.

Parcel #8.

Premises situated in the Village of Cuyahoga Falls, County of Summit, and State of Ohio and known as part of Lot #1, Tract #5, formerly Tallmadge Township. Beginning at an iron pin at the Northwest corner of said Lot #1, Tract #5; thence East on North line of said Lot #1, Tract #5, 32.3 feet to a stake; thence South Westerly parallel and 50 feet Northerly therefrom to Grantor's Easterly line and the West line of Right of Way of C. A. & C. R. R. about 58 feet to the West line of said Lot #1, Tract #5; thence North on West line of Lot #1, Tract #5, 48.3 feet to beginning, containing .02 acres.

This parcel is subject to the condition of a certain deed from C.
David Kenney to The Northern Ohio Power Company dated
340 June 14, 1911 and recorded in Book 430, Page 478.

Parcel #9.

Situated in the Township of Portage, County of Summit and State of Ohio, and known as parts of lots #1 and #2 Tract #3, in said Township.

Beginning at a point in center of The Old Churckery Race and the North line of Lot #2, Tract #3 and 535.8 feet East on the said tract line from the center of the Peck Road; thence South 29° 45′ West 296.50 feet to a stake; thence South 8° 9′ West 620 feet to a stake; thence South 11° 50′ West 234.90 feet to a stake; thence South 56° 21′ West 212.20 feet to a stake; thence South 34° 21′ West 556.40 feet to a stake; thence South 76° 06′ West 351.2 feet to a stake; thence South 66° 11′ West 100.20 feet to a stake; thence South 29° 41′ West 100 feet to a stake; thence South 50° 26′ West 100 feet to a stake; thence South 71° 16′ West 100 feet to a stake;

ence South 84° 1′ West 436.3 feet to a stake on Grantor's West
e and the West line of Lot #1, Tract #3 and 19 feet southerly
from Cyrus F. Bartel's Northeast corner.—This description
1 is intended to convey a strip of land 30 feet wide, being 15
feet on each side of the foregoing courses and distances and
ntains 2.26 acres of land more or less.
This parcel is the same premises appropriated by The Northern
io Power Company in Case No. — in Probate Court of Summit
unty.

Parcel #10.

Situated in the Township of Portage, County of Summit and
ate of Ohio and known as part of Tract #4 in said Township,
ginning at a stake at the Northeast corner of land formerly owned
Cyrus F. Bartell and at the east line of Tract #4; thence South
° 01′ West 157.70 feet to a stake; thence South 60° 34′ West
6.50 feet to a stake; thence South 57° 52′ West 359.20 feet to
rnest A. Jones' land, formerly Geo. Pofahl's East line; thence South
Ernest A. Jones' East line 35 feet to a stake; thence North 57° 52′
East parallel to the Northerly line and 30 feet there from
12 378.20 feet to a stake; thence North 60° 34′ East parallel
and 30 feet from the Northerly line 236.50 feet to a stake;
ence North 84° 1′ East parallel and 30 feet from the Northerly
ne, 148 feet to the East line of tract #4; thence North on the
act line about 33.40 feet to the beginning containing .52 acres.
This parcel is subject to the conditions of a certain deed given
Cyrus F. Bartell et al to The Northern Ohio Power Company and
corded in Book 428, Page 72.

Parcel #11.

Situated in the Township of Portage, County of Summit and
tate of Ohio and known as part of Tract #4 in said Township.
Beginning at the Southeast corner of land formerly owned by
rnest A. Jones; thence North 1° East on said Jones' East line 84.50
et to a stake; thence South 58° 45′ West 98.50 feet to a stake on
id Jones' South line; thence South 89 degrees east on said Jones'
outh line 48.50 feet to the beginning containing 47/1000 acres of
nd.
This parcel is the same premises conveyed to The Northern
43 Ohio Power Company from Ernest A. Jones by deed re-
corded in Book 429, Page 83 Summit County records of
eeds.

Parcel #12.

Situated in the Township of Portage, County of Summit and
tate of Ohio and known as part of Tract #4 in said Township.
Beginning at a stake on the North line of land formerly owned
by Charles Ratzow and 700.83 feet West of the East line of Tract
#4; thence South 58° 07′ West 1013.50 feet to a stake in the cen-

ter of the Peck Road and said Ratzow's South west corner; thence Northeasterly in said Peck Road center about 32 feet; thence North 58° 07′ East parallel to and 30 feet from the South line about 964.50 feet to a stake on said Ratzow's North line; thence East on said Ratzow's North line 61 feet to the beginning containing .68 acres.

This parcel is subject to the conditions of a certain deed from Charles A. Ratzow to The Northern Ohio Power Company recorded in Book 438, Page 583.

Parcel #13.

344 Situated in the Township of Portage, County of Summit and State of Ohio and known as part of Tract #4 in said Township.

Beginning at a stake in center of the Babb road and Southeast corner of land formerly owned by Elizabeth Herbruck, now owned by the City of Akron; thence West along the North line of land formerly owned by the Akron Soap Company 914.10 feet to a stake at said Company's Northwest corner; thence South on said Company's West line 30 feet to a stake thence East parallel and 30 feet from the North line about 916 feet to the center of Babb Road; thence Northerly in center of said Babb Road about 30.50 feet to the beginning containing .63 acres.

This parcel is subject to the conditions of a certain deed given by the Akron Soap Company to The Northern Ohio Power Company recorded in Book 429, Page 466.

Parcel #14.

Situated in the Village of Cuyahoga Falls, County of Summit and State of Ohio, and known as part of tract #2 formerly
345 Portage Township.

Beginning at a stake in center of Big Falls Road at the Northeast corner of land formerly owned by A. M. Cox; thence South on said Cox's land 1036.60 feet to land owned by The Northern Ohio Power Company; thence east on said Power Company's North line 30 feet; thence North parallel to West line 1036.60 feet to a stake in center of Big Falls Road; thence West in said Big Falls Road 30 feet to the place of beginning containing 71.100 acres. Being the same land conveyed to said Company by John P. Clark by deed recorded in Book 414, Page 156.

Parcel #15.

Situated in the Village of Cuyahoga Falls, County of Summit and State of Ohio and known as being part of Tract #2 formerly Portage.

Beginning in the center of Big Falls Road at the Northwest corner of land formerly owned by J. P. and M. Clark; thence North along the East line of land now or formerly owned by Irvin Waltz

and the West line of land formerly owned by Charles Schley
346 528 feet to a stake at said Schley's Northeast corner; thence East on said Schley's North line 30 feet to a stake; thence South parallel to the West line and 30 feet there from 528 feet to a stake in the center line of the Big Falls Road; thence West in said road center 30 feet to beginning, containing .363 acres of land.

This parcel is subject to the conditions of a certain deed given the Northern Ohio Power Company by Charles Schley recorded in Book 414, Page 157.

Parcel #16.

Situated in the Village of Cuyahoga Falls, County of Summit, State of Ohio and known as part of Tract #2 formerly Portage Township.

Beginning at the Northwest corner of land formerly owned by Charles Schley and the Southwest corner of land formerly owned by Henry C. Grant, (This point is located 528 feet north from the center of the Big Falls road); thence North along the West line of land formerly owned by said Grant 598.60 feet to the Northwest corner of land formerly owned by said Grant; thence east
347 along the North line of land formerly owned by said Grant 30 feet to a stake; thence South parallel to said Grant's former West line and 30 feet therefrom 598.60 feet to the South line of land formerly owned by said Grant; thence West 30 feet to the beginning containing .41 acres of land.

This parcel is the same land conveyed to The Northfield Ohio Power Company by Henry C. Grant by deed recorded in Book 417, Page 373 Summit County records of Deeds.

Parcel #17.

Situated in the Village of Cuyahoga Falls, County of Summit, State of Ohio and known as part of Tract #2 formerly Portage Township. Beginning at a stake at the Southeast corner of land now or formerly owned by Wm. Medkeff, said Stake is 240 feet on said Medkeff's East line, South from the center of Sacket Street; thence South on the East line of land now or formerly owned by James S. Ray et al. 814.66 feet to a stake at the Northeast corner of land now or formerly owned by Irvin Waltz; thence West 30 feet to a stake in the South line of land now or formerly owned by
348 James S. Ray, et al.; thence North parallel to said Ray's former East line 814.66 feet to a stake in said Ray's North line and said Medkeff's South line; thence East 30 feet to beginning containing .56 acres.

This parcel is the same premises conveyed to The Northern Ohio Power Company by James S. Ray, et al. deed of which is recorded in Book 414, Page 158 Summit County Records.

Parcel #18.

Premises situated in the Village of Cuyahoga Falls, County of Summit, State of Ohio and known as part of Tract #2 formerly Portage Township.

Commencing in the center of Sachet street in said Village at the Northwest corner of land, formerly owned by Ellen K. Crawford et al.; thence South on West line of land formerly owned by said Crawford 362.5 feet to the Southwest corner of land formerly owned by said Crawford, thence East on the South line of land formerly owned by said Crawford 120 feet to land now or formerly owned by
349 Fritz; thence North parallel to said first line to center of Sackett street; thence West in the center line of Sackett street to the place of beginning and containing one (1) acre of land.

This parcel is the same premises conveyed to The Northern Ohio Power Company by Ellen K. and Mathew Crawford by deed recorded in Book 432, Page 49.

Parcel #19.

Situated in the Village of Cuyahoga Falls, County of Summit, and State of Ohio and known as being part of Tract #2 formerly Portage Township.

Beginning at a stake in the center line of Sackett Street at the Northwest corner of land formerly owned by H. & M. Crawford; thence North 346.50 feet to a stake at the Southwest corner of land, formerly owned by E. D. Duncan; thence East 30 feet to a stake; thence South parallel to the West line 346.50 feet to a stake in the center of Sackett Street; thence West in said center line of Sackett street 30 feet to the place of beginning, containing .23 acres.

This parcel is subject to the conditions of a certain deed
350 given to the Northern Ohio Power Company by *by* Eliza Thompson et al. and recorded in Book 417, Page 375.

Parcel #20.

Situated in the Village of Cuyahoga Falls, County of Summit, State of Ohio and known as being part of Tract #2 formerly Portage Township.

Beginning at a stone in the North line of Tract #2 and corporation line of the Village of Cuyahoga Falls, the said stone is 164.00 feet West of the Southeast corner of Lot #20 Northampton Township; thence South 1303.5 feet to the Northwest corner of land formerly owned by Robert Thompson; thence on said Robert Thompson's former North line 30 feet; thence parallel to the West line 1303.50 feet to a stake in the North line of said Tract #2; thence West on Tract line 30 feet to the place of beginning, containing 89/100 acres.

This parcel is subject to the conditions of a certain deed given by Edgar D. Duncan to The Northern Ohio Power Company and recorded in Book 414, Page 159 Summit County Records of Deeds.

351 Parcel #21.

Situated in the Township of Northampton and Village of Cuyahoga Falls, County of Summit, State of Ohio and known as part of Lot

) in said Township and part of Lot #10 in said Village form- Northampton Township.
eginning at a stone at the Northeast corner of Lot #20; thence thwesterly to a stone situated in the South line of Lot #20 and oration line of Cuyahoga Falls and the Northeast corner of land or formerly owned by Caroline Post about 311.00 feet; thence on corporation and South line of Lot #20, 30 feet to a stake; ice Northeasterly parallel with the Northwesterly line 311.00 feet stake in the North line of Lot #10; thence West on North line ot #10 30 feet to a place of beginning, containing .11 acres and, .09 acres being in Lot #20 Northampton Township; .02 s being in Lot #20 Cuyahoga Falls.
his parcel is subject to the conditions of a certain deed given to The Northern Ohio Power Company by Walter L. Hitchcock et al. and recorded in Book 414, Page 160, Summit County Records.

Parcel #22.

remises situated in the Village of Cuyahoga Falls, County of mit and State of Ohio, and known as part of Lot #9 formerly thampton Township.
eginning at a stake in the center of Northampton Avenue, and t corporation line of Cuyahoga Falls; thence South on said oration line 2686.37 feet to a stone in South line of Lot #9; ice East on said Lot line 30 feet to a stake; thence North parallel West line of Lot about 2632.5 feet to center of Northampton nue; thence in said Avenue center about 38 feet to place of begin- containing 1-84/100 acres of land.
his parcel is subject to the conditions of a certain deed given Northern Ohio Power Company by F. S. Bales et al. and recorded ook 414, Page 161, Summit County Records.

Parcel #23.

Situated in the Village of Cuyahoga Falls, County of Summit and State of Ohio and known as being part of Lot #9 formerly Northampton Township.
eginning at a stone at the Northwest corner of said Lot #9; ice South on West line of said Lot #9 77.88 feet to a stake in center of Northampton Avenue; thence Southeasterly in said er line 38.3 feet to a stake; thence North parallel to said West of Lot #9, 99.7 feet to a stake in the North line of Lot #9; ice West on the North line of Lot #9, 30 feet to the place of be- ning, containing .06 acres of land.
his parcel being the same premises conveyed by Ruth W. Prior The Northern Ohio Power Company by deed recorded in Book Page 477, of Summit County Records.

Parcel #24.

Situated in the Village of Cuyahoga Falls, County of Summit, State of Ohio and known as part of Lot #8, formerly Northampton Township.

354 Beginning at a stone at the Southwest corner of said Lot #8; thence North on West line of said Lot #8, 2593.50 feet to a stone at the Northwest corner of said Lot #8; thence East on the North line of said Lot #8 150 feet to a stake thence Southwesterly 170 feet to a stake situated 30 feet East of the West line of said Lot #8 and 120 feet South of the North line of Lot #8; thence South parallel to West line and 30 feet therefrom 2473.50 feet to the South line of said Lot #8; thence on the South line of Lot #8, 30 feet to the beginning, containing 2 acres of land.

This parcel is the same premises as conveyed by John and Elizabeth Armstrong to The Northern Ohio Power Co., by deed recorded in Book 414, Page 162, Summit County Records of deeds.

Parcel #25.

Situated in the Township of Northampton, County of Summit, State of Ohio and known as being a part of Lot #18 in said Township.

355 Beginning at the Southeast corner of said Lot #18 thence North on the East line of said Lot (which is also the West corporation line of Cuyahoga Falls) 1586.64 feet to the Northeast corner of land formerly owned by Minnie E. James, et al.; thence West 30 feet; thence South parallel to and 30 feet from the East line about 1586.64 feet to the South line of Lot #18; thence East 30 feet to the beginning, and containing 1.09 acres of land.

This parcel is subject to the conditions of a certain deed recorded in Book 463, Page 233, Summit County Records of Deeds.

Parcel #26.

Situated in the Township of Northampton, County of Summit, State of Ohio and known as being part of Lot #18 East of River in said Township.

356 Beginning at a point in the Easterly line of said Lot #18, 327.36 feet Southerly from a stone at the Northeast corner of said Lot #18; thence Southerly from a stone at the Northeast corner of said Lot #18; thence Southerly along the Lot line 679.80 feet to the Northeast corner of land formerly owned by Minnie E. and Lourel James; thence Westerly along James' former Northerly line 30 feet; thence Northerly parallel to the lot line 679.80 feet more or less to Thomas's Northerly line; thence Easterly along said Northerly line 30 feet to the point of beginning and containing .47 acres more or less.

This parcel is the same premises conveyed by John H. Shiller

to The Northern Ohio Power Company, the deed of which is recorded in Book 465, Page 142, Summit County Records of Deeds.

Parcel #27.

Situated in the Township of Northampton, County of Summit, State of Ohio and known as part of Lot #7 in said Township.

Beginning at a stone at the Southwest corner of Lot #7; thence East on the South line of said Lot #7. 1029.60 feet to the Southeast corner of land formerly owned by Herman H. Prange; thence North on said Prange's former East line 30 feet; thence West and parallel to the South line 1029.60 feet to the West line of
357 Lot #7; thence South on the West line of Lot #7 a distance of 30 feet to the place of beginning, containing .71 acres of land.

This parcel is subject to the conditions of a certain deed given by Herman H. Prange to The Northern Ohio Power Company and recorded in Book 414, Page 163 Summit County Record of Deeds.

Parcel #28.

Premises situated in the Township of Northampton, County of Summit and State of Ohio and known as part of Lot #7 in said Township.

Beginning at a point on the South line of said Lot #7 and in the Southeast corner of land formerly owned by H. H. Prange and 1029.0 feet east of the West line of Lot #7; thence east of the South line of said Lot #7 273.90 feet to a stake in the Southeast corner of land formerly owned by Myron W. Shick thence North on said Shick's former line 30 feet to a stake; Thence West 273.90 feet to a stake on said Shick's former West line; thence South 30 feet to the beginning, containing .19 acres.

358 This parcel is subject to the conditions of a certain deed given by Myron W. Schick et al. to The Northern Ohio Power Company recorded in Book 414, Page 164, Summit County records of deeds.

Parcel #29.

Situated in the Township of Northampton, County of Summit, State of Ohio and known as part of Lot #7 in said Township of Northampton.

Beginning at a stone on the South line of Lot #7 and the Southeast corner of land formerly owned by Rudolph Wild; thence West on South line of Lot #7 630.96 feet to a stone pipe; thence North on said Wild's former West line 30 feet to a stake; thence East parallel to the South line of Lot #7 630.96 feet to a stake on said Wild's former East line; Thence South on said Wild's former East line 30 feet to the beginning containing .43 acres.

359 This parcel is subject to the restrictions of a certain deed from Rudolph Wild to The Northern Ohio Power Company and recorded in Book 414, Page 165.

Parcel #30.

Situated in the Township of Northampton, County of Summit, State of Ohio and known as part of Lot #7 in said Township.

Beginning at a stone in the Southeast corner of said Lot #7; thence West on the south line of Lot #7, 640.3 feet to a stake at the Southwest corner of land formerly owned by Myron W. Schick et al., thence North on said Shick's former West line 387.50 feet to a stake; thence East parallel to the South line of said lot. 640.30 feet to a stake in the East line of said Lot #7 and said Township; thence South on the Township line 387.50 feet to the beginning, containing 5.69 acres be the same more or less.

This parcel is subject to the conditions of a certain deed given by Myron W. Schick et al. to The Northern Ohio Power Company and recorded in Book 414, Page 164 Summit County Records of Deeds.

Parcel #31.

360 Situated in the Township of Stow, County of Summit and State of Ohio and known as part of Lot #21 in said Township.

Beginning at a stone in the Southwest corner of Lot #21; thence East on the South line of Lot #21 2299.40 feet to a stone in center of Bailey Road; thence Northwesterly in said road center about 39 feet; thence West on a line parallel and 30 feet from the South line of Lot #21 about 2280.4 feet to the West line of Lot #21; thence South on said West line of Lot #21, 30 feet to the place of beginning, containing 1.57 acres.

This parcel is subject to the conditions of a certain deed from Bertha E. Johnson to The Northern Ohio Power Company and recorded in Book 414, Page 166 Summit County Records of Deeds.

Parcel #32.

Situated in the Township of Stow, County of Summit and State of Ohio, and known as part of Lot #21 in said Township.

Beginning at a stone at the Southeast corner of lot #21; thence West on South line of Lot #21, 701.5 feet to a stone in center of Bailey Road; thence Northwest on center line of said Bailey Road 39 feet to a stake; thence East on a line parallel to and 30 feet
361 from said South line about 720.5 feet to a stake in the East line of said lot #21; thence South on East line of said Lot #21, 30 feet to the place of beginning, containing .49 acres of land.

This parcel is subject to the conditions of a certain deed from John Nihousen et al. to The Northern Ohio Power Company recorded in Book 414, Page 167 Summit County Records of Deeds.

Parcel #33.

Situated in the Township of Stow, County of Summit and State of Ohio and known as being part of Lot #22 in said Township.

Beginning at a stone in the Southwest corner of Lot #22; thence East on the South line of said Lot #22, 1989 feet to the Southeast corner of land formerly owned by William C. Keenan; thence North on said Keenan's former East line 30 feet; thence West parallel to the South line of said Lot #22 1989 feet to the West line of Lot #22; thence South on the West line of Lot #22 30 feet to the place of beginning containing 1.37 acres.

362 This parcel is subject to the conditions of a certain deed from William Keenan to The Northern Ohio Power Company recorded in Book 431, Page 407 Summit County Records of Deeds.

Parcel #34.

Situated in the Township of Stow, County of Summit and State of Ohio and known as part of Lot #22, in said Township.

Beginning at the West line of the C. A. & C. R. R. Right of Way and the South line of Lot #22 about 426 feet West of the Southeast corner of said Lot #22; thence West on the South line of said Lot #22, 244 feet to a stake; thence North on the West line of land formerly owned by Samuel Wild et al. 30 feet; thence East about 246 feet to a stake on the West line of The C. A. & C. R. R. Right of Way; thence Southwesterly on said Wild's former East line about 31 feet to the place of beginning, containing about .17 of an acre.

This parcel is subject to the conditions of a certain deed given by Samuel W. Wild et al. to The Northern Ohio Power Company and recorded in Book 429, Page 82.

Parcel #35.

Situated in the Township of Stow, County of Summit and State of Ohio and known as being a strip of land 33 feet wide taken

363 off the South side of Lots #22 and 23 and extending easterly from the line of The C. A. & C. Ry. to the land formerly owned by Lavina F. Wagner and is further described as,—

Beginning at a stone at the Southeast corner of Lot #22 thence by four courses as follows: Course #1 N. 89° 49′ 40″ W. 368.86 feet to line of the railroad land. Course #2. N. 15° 2′ 20″ E. along a line parallel to center line of Railroad and 33 feet distant therefrom 34.14 feet. Course #3 S. 89° 49′ 40″ E. 368.90 feet to line of land formerly owned by Lavina F. Wagner. Course #4. S. 15° 08′ 40″ along land of said Wagner 34.18 feet to the beginning contains 0.28 acres of which 0.27 acres is in lot #22 and 0.01 acres is in Lot #23 be the same more or less but subject to all legal highways.

This parcel is subject to the conditions of a certain deed given by the Silver Lake Park Company to The Northern Ohio Power Company, and recorded in Book 427, Page 271.

Parcel #36.

Situated in the Township of Stow, County of Summit and State of Ohio and known as part of Lot #23 in said Township.

364 Beginning at a stone in the Southwest corner of said Lot #23; thence N. 15° 08′ E. 34.18 feet; thence s. 89° 49′ E. 179 feet to a point in the Northerly line of the old Silver Lake branch of The N. O. T. & L. Company's Right of Way; thence following an arc whose radius is 716.34 feet and also the Northerly line of said Right of Way to the place of beginning containing 6/100 of an acre.

It is the intention of this description to convey all the land conveyed to The Northern Ohio Power Company by a certain deed from Wm. R. Lodge and recorded in Book 434, Page 449 of Summit County Records.

Parcel #37.

Situated in the Township of Stow, County of Summit and State of Ohio and known as part of Lot #14 in said Township of Stow.

Beginning at a point in the center of the highway leading from Cuyahoga Falls to Kent and 349.05 feet Easterly from the West line of said Lot #14 measured along the center line of said highway; thence South 59° 35′ east 1139.04 feet to a stake on the East

365 line of land formerly owned by Irene P. Gaylord et al. and the West line of The Cleveland and New Castle R'y's Right of Way; thence North 3° 42′ West on said Gaylord's former East line 79.64 feet to a stake; thence North 59° 35′ West parallel to and 66 feet from the Southerly line 973.36 feet to the center of the before mentioned road; thence South 80° 03′ West along said road center 101.90 feet to the beginning containing 1–60/100 acres be the same more or less.

This parcel is subject to the conditions of a certain deed given by Irene P. Gaylord et al. to The Northern Ohio Power Company and recorded in Book 444, Page 364 of Summit County Records.

Parcel #38.

Situated in the Township of Stow, County of Summit, and State of Ohio and known as Lot #20 in said Township of Stow.

Beginning at a stone monument at the Northeast corner of said Lot #20 and on County line; thence Westerly on the North line of said Lot #20, 1221 feet to the West line of land formerly owned by the Land and Improvement Co., and the East line of land formerly owned by Amanda Moore; thence Southerly on said Moore's

366 East line 30 feet; thence Easterly parallel to the North line of said Lot 1221 feet to the East line of said Lot; thence Northerly on said East line 30 feet to the place of beginning containing about 0.84 acres.

This parcel is subject to the conditions of a certain deed given by the Land and Improvement Company to The Northern Ohio Power Company and recorded in Book 469 Page 211.

Parcel #39.

Situated in the Township of Portage, County of Summit and State of Ohio and known as part of Lot #5, Tract #3 in said Township.

Beginning in the center of Cuyahoga Falls Avenue at the Northeast corner of land conveyed by James Kerwin to Edward D. Hoffman deed of which is recorded in Book 432, Page 383; thence Southwesterly in said center line 144.77 feet to said Kerwin's West line; thence with a deflection of 67° 03′ to the left 132.58 feet; thence with a deflection of 90° to the left 141 feet to said Kerwin's East line; thence 92° 20′ to the left 189.21 feet to the beginning, con-
367 taining 51/100 acres.

Parcel #40.

Situated in the Township of Portage County of Summit and State of Ohio, and known as parts of Tract #3 Lot #5 and Tract #6, Lots #3 and 4 in said Township.

Beginning in the center line of Tallmadge Ave.

52.64 feet Westerly on said center line from the West line of said Lot #3, Tract #6 to a point in the East right of Way line of the N. O. T. & L. Co.; thence with a deflection to the right of 91° 31′ a distance of 112.2 feet; thence following an arc (the radius of which is 2814.93 feet) 1039.59 feet; thence on line tangent to said arc 1387.55 feet to the East line of land sold by James Kerwin to Edward D. Hoffman by deed recorded in Book 432. Page 383; thence with a deflection of 26° 45′ to the left 222.16 feet to the West line of The Northern Ohio Traction & Light Company's Right of Way; thence with a deflection to the left 153° 15′ 1585.95 feet; thence on an arc (the radius of which is 2914.93 feet) 1076.41 feet; thence on a line tangent to said arc 114.86 feet to the center line of Tallmadge
368 Avenue; thence North 88° 45′ East on said center line 100 feet to the beginning, containing 6.1 acres of which amount there is 3.03 acres in tract #3 Lot #5 and 1.90 acres in Tract #6, Lot #4 and 1.17 acres in Tract #6, Lot #3.

Parcel #41.

Situated in the Township of Portage County of Summit and State of Ohio and known as being part of Lot #8 Tract #6 in said Township.

Beginning at a point in the South line of said Lot #8, 63.65 feet Easterly on said lot line from a stone at the Southeast corner of 10 acres of land formerly owned by Patrick Latham; thence 0° 16′ East 477.2 feet to the North line of Lot #8 and center line of Tallmadge Avenue; thence North 88° 45′ East on said center line of Tallmadge Avenue 117 feet; thence South 0° 21′ West 478.3 feet to the South line of Lot #8; thence Westerly on said lot line to the place of beginning, containing 1.28 acres.

Parcel #42.

369 Situated in the Township of Portage, County of Summi and State of Ohio and known as part of Tract #6.

Beginning at a stone set at the Northwest corner of land formerl owned by Frederick Fouse; thence South 89° East 2 chains 3 links; thence South 1¼° East parallel with the West line 18 chain 73 links to the center of Glenwood Avenue; thence South 81° Wes along said center line 2 chains 40 links to a stone; thence North 1 East along West line of land formerly owned by Frederick Fouse 19 chains 14 links to the beginning, containing 4.50 acres being the same land conveyed to The Northern Ohio Power Company by Ed. D. Hoffman by deed recorded in Book 430, Page 472.

Parcel #43.

Situated in the Township of Portage, County of Summit and State of Ohio and known as being part of Tract #6 in said Township.

Beginning at a stone in the center of Glenwood Avenue, said stone being at the Northeast corner of land owned by Wil
370 liam Zellers in said tract; thence South 1° 25′ West 6.91 chains along the East line of Zeller's land to a stone thence South 88° 15′ East 3.09 chains to a stone; thence North 2¾° West 7.42 chains to a stone; thence South 81° 40′ West 2.58 chains to the place of beginning, containing 2.01 acres. Being the same land conveyed to The Northern Ohio Power Company by Ed. D. Hoffman by deed recorded in Book 430, Page 463.

Parcel #44.

Situated in the Township of Portage, County of Summit and State of Ohio and known as being Lots #1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, in the Lookout Park allotment as recorded in Plat Book 6, Page 61 of Summit County records of plats. Also lots #1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, in the Akron Heights allotment as recorded in Plat Book 8, Page 38, Summit County Records of plats.

The above premises is the same as conveyed to The Northern Ohio Power Company by J. W. H. Myers (Trustee) by deed recorded in Book 430, Page 474.

371 Parcel #45.

Situated in the Township of Portage County of Summit and State of Ohio and known as,—

Beginning at the Southeast corner of Lot #16, Akron Heights allotment, as recorded in Plat Book 8, Page 38 Summit County Records of Plats; thence East along the South line of Lot #16, 130 feet; thence South at right angles to said last mentioned line to the Northeast corner of Lot #17 of the Akron Heights allotment,

thence Westerly along the North line of Lot #17 to the East line of Columbia Avenue; thence North to the place of beginning, being the same land as conveyed to The Northern Ohio Power Company by J. A. H. Myers, by deed recorded in Book 434, Page 115.

Parcel #46.

Situated in the Township of Portage, County of Summit and State of Ohio and known as being part of a 10.10 acre tract of land which was conveyed Dec. 1, 1903 by The Central Savings & Trust Co., Trustee to A. D. Alexander, by deed recorded in Book 350, Page 14, Summit County Records.

372 Beginning at the Southeast corner of Lot #17 of the Akron Heights allotment as surveyed in October 1903 by Ed. W. Paul surveyor, and recorded in Plat Book 8, Page 38 Summit County Records, said beginning point being also the Northeast corner of about mentioned 10.10 acres tract of land; thence South 1° 53′ West about 110 feet along the East line of said 10.10 acres tract of land, to a stake set at a corner of a 5.26 arces tract of land which was conveyed by A. D. Alexander to the Pittsburgh, Cleveland & Toledo Ry. Co., by deed recorded in Book 348, Page 2, Summit County Records; thence South 67° 23′ West 43 feet along a line of said 5.26 acres tract of land to a marked stone in the bottom of the Ravine; thence North 86° 39′ West 102.90 feet along a line of said 5.26 acres tract of land to a point in the center of the bridge and to a point in the East line of an 8.80 acre tract of land which was conveyed March 22, 1907 by A. D. Alexander to Clara Ott, be deed recorded in Book 350, Page 556, Summit County Records; thence North 3° 21′ East, about 108.00 feet along the center line of

373 said bridge to a point in the South end of Columbia Avenue in the above mentioned allotment; thence East along the South end of said Avenue to the Southeast Corner thereof; thence North 30 feet along the East line of said Avenue to the Southwest corner of said Lot #17; thence East 130.00 feet along the South line of said Lot #17 to the place of beginning and containing 0.33 acres, being the same land as conveyed by J. A. H. Myers to The Northern Ohio Power Company by deed, Recorded in Book 430, Page 475.

Parcel #47.

Situated in the Township of Portage, County of Summit and State of Ohio, and known as,—

Beginning at the Southwest corner of Lot #17 of The Akron Heights Allotment as recorded in Plat Book 8, Page 38; thence South on the East line of Columbia Avenue extended to the Right of Way of The Northern Ohio Traction and Light Co., thence West along the North line of the Right of Way of The Northern Ohio Traction & Light Company to the Point of Intersection of the North line of the Right of Way of The Northern Ohio Traction &

374 Light Company and the West line of Columbia Avenue extended; thence Northerly along a line parallel with the West

line of Columbia Avenue to the Southeast corner of Lot #119 in The Akron Heights Allotment; thence East to the place of beginning, being the same strip of land conveyed to The Northern Ohio Power Company by the Central Savings & Trust Company deed of which is recorded in Summit County records of deeds, Book 427, Page 486.

Parcel # 48.

Situated in the City of Akron and Township of Portage, County of Summit, and State of Ohio and known as part of Block 41 in the Perkins addition to Akron as recorded in Plat Book 1, Page 13 and part of Tract 6, Portage Township.

Beginning in the North line of North street at a point 199 feet North 73° 33′ West (by old survey) from the Southeast corner of a 10.58 acre trace of land conveyed by Henry B. Perkins to James Rogers by deed dated Jan. 24, 1888 and recorded in Book 160 Page 608.

Said beginning point being also the Southwest corner of
375 a 2.13 acre tract conveyed by James Rogers by deed recorded in Book 169, Page 372; thence along the West line of said James Rogers tract North 0° 44′ West 984.72 feet to the North line of said James Rogers Tract; thence South 88° 41′ West along said West line 141.73 feet to the Northeast corner of a 2.99 acre tract conveyed by James Rogers and wife to Mary Bevis by deed recorded in Book 203, Page 319, Summit County Records; thence South along Mary Bevis' East line 866 feet to an angle in said East line; thence at right angles to the North line of North street 70 feet to said North line thence south 72¾° East along said North line 167.9 feet to the place of beginning, containing 2.50 acres of which 2.04 acres are in said Block 41 and 46/100 are in said tract #6. Being the same land conveyed to The Northern Ohio Power Company by Anna E. and Robert Tryon deed of which is recorded in Book 430, Page 476.

Parcel #49.

Situated in the City of Akron, County of Summit and State
376 of Ohio and known as Lots #16. 17. 18. Block #38 Perkins addition as recorded in Plat Book 1, Page 71 of the Records of Summit County, Ohio. Subject to the Rights of the Cleveland Terminal & Valley Railway Company and The Baltimore & Ohio Railroad Company. Being the same premises as conveyed to The Northern Ohio Power Company by Martha D. Alexander by deed recorded in Book 446, Page 403, and all the estate, title
377 and interest of said Grantor in and to said premises.

To have and to hold, said premises with the appurtenances thereunto belonging to the said Grantee, its successors and assigns forever, subject, however, to all legal highways, and subject to the conditions herein contained and subject to all of the conditions and reservations recited in the original conveyances to said The Northern Ohio Power Company.

And the said Grantor, for itself and its successors hereby covenants with the said Grantee, its successors and assigns that said Grantor is the true and lawful owner of said premises, and is well seized of the same in fee simple, and has good right and full power to bargain, sell and convey the same in manner aforesaid, and that the same are free and clear from all encumbrances except taxes and assessments, which the grantee assumes and agrees to pay and further that said Grantor will warrant and defend the same against all things and persons whatsoever.

In witness whereof, said The Northern Ohio Power Company has caused its corporate name to be subscribed and its corporate
378 seal to be affixed to these presents by its President and Secretary this 24th day of February in the year of Our Lord One Thousand nine hundred and fourteen.

[SEAL.] THE NORTHERN OHIO POWER COMPANY,
By CHARLES HOWLAND, *President.*
T. W. WAKEMAN, *Secretary.*

Signed, sealed and acknowledged in presence of—
C. F. MOORE.
J. E. WESENER, JR.

STATE OF OHIO,
Summit County, ss:

Before me, a Notary Public in and for said County, personally appeared Charles Howland and T. W. Wakeman, President and Secretary respectively of The Northern Ohio Power Company, the corporation which executed the foregoing instrument, who acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that they did sign and seal said instrument as President and Secretary respectively in behalf of said corporation, and by authority of its board of Directors and Stockholders, and that said instrument is the free act and deed of said The Northern Ohio Power Company.

In testimony whereof I have hereunto subscribed my name at Akron, Ohio, this 24th. day of February A. D. 1914.

[SEAL.] N. O. MATHER,
Notary Public.

379 Mr. Mather: We now offer in evidence the deed of The Northern Ohio Traction Company to The Northern Ohio Traction & Light Company dated the 29th day of December 1902. Recorded in Volume 287 at pages 36 to 65 of Summit County Records of deeds.

Mr. Frank: We object to that.

The Court: Objection overruled, it may be admitted.

Plaintiff excepts.

A true copy of said deed is hereto next annexed and made a part hereof at pages — to — hereof both inclusive.

380 No. 31723.

The Northern Ohio Traction Co.
to
Northern Ohio Traction & Light Co.

Whereas, on the 24th day of November 1902, the Vice President and Secretary of The Northern Ohio Traction Company, a corporation duly organized and existing under the laws of the State of Ohio acting pursuant to authority of the Board of Directors of said corporation, given at their meeting held at Cleveland Ohio, on the 24th day of November 1902, entered into a certain contract for the sale, transfer, and conveyance to The Northern Ohio Traction and Light Company, a corporation also duly organized and existing under the laws of the State of Ohio, of all of the railways, plants, properties, rights, franchises, and privileges of said The Northern Ohio Traction Company, so that the same should be taken over by said The Northern Ohio Traction & Light Company as a going concern, as of December 29" 1902, in consideration of said the Northern Ohio Traction and Light Company assuming all of the debts and liabilities of said The Northern Ohio Traction Company and in further consideration of the delivery to said The Northern Ohio Traction Company for the purpose of distribution among its stockholders of sixty thou-
sand (60,000) shares of the par value of $100.00 esach, ag-
381 gregating six million dollars, out of a total authorized issue of seventy five thousand (75,000) shares aggregating seven million, five hundred thousand dollars, of the full paid capital stock of the Northern Ohio Traction & Light Company, said stock to be distributed among the stockholders of said The Northern Ohio Traction Company, as follows: To its present common stock holders fifty thousand (50,000) shares aggregating at par five million dollars: To its present preferred stock holders ten thousand (10,000) shares aggregating at par one million dollars; and in further consideration of the delivery to said The Northern Ohio Traction Company out of an authorized issue by said The Northern Ohio Traction & Light Company of thirty year gold bonds, secured by a first consolidated mortgage or deed of trust upon all of its property, whether now owned or hereafter to be acquired aggregating seven million, five hundred thousand dollars of which one million dollars shall bear interest at the rate of five per cent per annum, payable semi-annually and the remaining six million, five hundred thousand dollars shall bear
interest at the rate of four per cent, per annum payable semi-
382 annually, bonds to be distributed among the stockholders of the Northern Ohio Traction Company, as follows; to its present common stock holders four per cent bonds to the amount of one million, two hundred and fifty thousand dollars; and to its present preferred stock holders five per cent bonds to the amount of one million dollars; and in further consideration of the setting apart of three million dollars, par value, of said four per cent bonds of said The Northern Ohio Traction & Light Company to be held and disposed of by the Trustee of the mortgage securing said bonds for

purpose of redeeming outstanding bonds of or upon the prop-
of said The Northern Ohio Traction Company; and in further
ideration of the sale by said The Northern Ohio Traction and
t Company of five hundred thousand dollars, par value, of its
bonds, and the use of the proceeds thereof, after paying all
nses connected with the bringing about of the sale aforesaid,
the expense of the organization of said The Northern Ohio
tion and Light Company plus the sum of $10,000.00 and the
payment of the floating debt of The Northern Ohio Traction
Company, in the making of improvements, additions, ex-
tensions and betterments to the property of The Northern
Traction and Light Company; and in further consideration
he reservation by said The Northern Ohio Traction and Light
pany of one million seven hundred and fifty thousand dollars,
value, of said 4 per cent bonds to be used for the purpose of
ing future betterments, improvements, additions, and exten-
s of the property of said The Northern Ohio Traction and Light
pany; and whereas, said contract provided that the deed of
veyance and transfer of said railroads, property, plants, rights,
chises and privileges, should be executed and delivered to The
thern Ohio Traction and Light Company upon the receipt by
Northern Ohio Traction Company of the aforesaid stock and
ds so to be delivered for distribution among its stock holders,
he receipt by said The Northern Ohio Traction Company of
d and sufficient orders for said stock upon the registrar & transfer
nt of the Northern Ohio Traction and Light Company; and a
good and sufficient order for said bonds on the Trustee of
the mortgage securing said bonds and the Vice President and
Secretary of said The Northern Ohio Traction Company were
horized and empowered to executed and deliver, such deed upon
terms aforesaid, upon the stock holders of said The Northern
io Traction Company assenting to said sale and convevance; and
ereas the stock holders of said The Northern Ohio Traction and
ht Company, at their meeting duly called and held at the City
Akron, Ohio, on the 29th. day of December, 1902, unanimously
ented to, ratified and approved the said contract of sale con-
ance and transfer above set forth, and authorized its officers to
ry out the same on the part of said Company; and whereas the
ckholders of The Northern Ohio Traction Company at their
eting duly called and held in the City of Akron, Ohio, on the
th. day of December, 1902, duly assented to, ratified and ap-
oved the said contract of sale, conveyance and transfer above set
th, and authorized the Vice President and Secretary of said
mpany, upon receipt of said stocks and bonds, or good and
fficient orders for said stock upon the registrar and transfer agent
of said The Northern Ohio Traction and Light Company and
5 a good and sufficient order upon the Trustee of the mortgage
securing said bonds, for the delivery of said bonds to The
rthern Ohio Traction Company to execute and deliver to said
ie Northern Ohio Traction and Light Company a good and
fficient deed of all the railways, plants, properties, rights, fran-

chises and privileges of said The Northern Ohio Traction Company, and to deliver immediate possession thereof; and, whereas The Northern Ohio Traction and Light Company has increased its authorized capital stock to seven million, five hundred thousand dollars, divided into shares of $100.00 each and has authorized its officers to issue its bonds to the amount hereinbefore set forth, and bearing interest as hereinbefore set forth, and to secure the payment of the same by a mortgage or deed of trust, to The Saving and Trust Company of Cleveland Ohio, as Trustee, upon all its property, rights, franchises and privileges whether now owned or hereafter to be acquired; and, whereas, the officers of said The Northern Ohio Traction and Light Company have executed and delivered said mortgage in due form of law, providing for
386 all of the matters and things hereinabove set forth, required to be provided for in said mortgage or deed of trust; and, whereas, the Vice President and Secretary of The Northern Ohio Traction and Light Company have executed and delivered to the President and Secretary of The Northern Ohio Traction Company a good and sufficient order upon The Savings and Trust Company of Cleveland, Ohio, as transfer agent for said The Northern Ohio Traction and Light Company, and upon the Western Reserve Trust Company of Cleveland, Ohio, as registrar of the stock of said The Northern Ohio Traction and Light Company, directing the delivery to The Northern Ohio Traction Company or its order of said six million dollars of capital stock of said The Northern Ohio Traction and Light Company, and have also executed and delivered to The Northern Ohio Traction Company, a good and sufficient order upon the Savings and Trust Company as Trustee, under said mortgage or deed of trust securing said bonds directing the certification and delivery to The Northern Ohio Traction Company or on its order, of said one million, two hundred and fifty thousand dollars, par value of said 4 per cent bonds and one million dollars par
387 value of said 5 per cent bonds.

Now therefore, Know all men by these presents; that, in consideration of the premises and of the said bonds and stocks, and of the sum of one dollar, received to the full satisfaction of The Northern Ohio Traction Company, the grantor, from The Northern Ohio Traction and Light Company, the grantee, the said grantor has given, granted, bargained, sold, assigned transferred conveyed and set over, and by these presents does give grant, bargain, sell, assign transfer and convey and set over, unto The Northern Ohio Traction and Light Company its successors and assigns forever all and singular the following described property, rights franchises and privileges to wit: Parcel number one. Situated in the Village of Cuyahoga Falls, County of Summit, and State of Ohio, and known as being a part of original Lot No. 2 in the Township of Stow, and bounded and described as follows; beginning at a point upon the north line of North street in said Village, at the intersection of the westerly line of Second street, thence north 46 degrees 30 minutes

east parallel to the center line of Front street to lands of Wm. J. Allen, thence south 34 degrees 40 minutes east sixty-six and eighty-eight one hundredths (66.88) feet, thence th 46 degrees 30 minutes west parallel to the first mentioned line a point on the northerly line of North street, which would be intersection of the easterly line of Second street prolonged, nce along the northerly line of North street sixty-six (66) feet he place of beginning, be the same more or less containing sixty ee (63) one hundredths of an acre of land. Parcel Number two. uated in the Village of Cuyahoga Falls, County of Summit and te of Ohio, and known as being a strip of land sixty six (66) wide across lands of grantors and bounded and described as ows; beginning at a point on the southwest line of land owned grantors and the northwesterly line of land owned by grantors the northwesterly line of land owned by R. W. Harrington others, said point upon said line being north 34 degrees 15 utes west three hundred and sixty seven and seventy eight one dredths (367.78) feet from the center line of Front street, thence 46 degrees 30 minutes east two hundred and eighty two and ninety eight one hundredths (282.98) feet; thence north 45 degrees 10 minutes west sixty six feet (66); thence th 46 degrees 30 minutes west two hundred and seventy six and nty five one hundredths (276.85) feet to a point on the said erly line of said Harrington's land; thence south 34 degrees 15 utes east along said line of Harrington's land sixty-six and nty seven one-hundredths (66.87) feet to the place of beginning, taining four hundred and eighteen thousandths (.418) of an acre and. Conveying herein a strip of land sixty-six (66) feet wide, center line of which is twenty four (24) rods from the center of Front street measured at right angles thereto. Parcel Number ee. Situated in the Village of Cuyahoga Falls, County of Sum-, and State of Ohio, and known as being a strip of land sixty-(66) feet wide across the lands of grantor in Lot No. 12 and No. 2 in the original Township of Stow, and bounded and de-bed as follows; beginning at a point on the northerly line of land owned by W. J. Allen, in said lots north 45 degrees 10 minutes west three hundred and sixty three and ten one hundredths (363.10) feet from the center line of Front street nce north 46 degrees 30 minutes east three hundred and twelve eighty nine one hundredths (312.89) feet to lands of Emma dsworth thence north 50 degrees 35 minutes west sixty and fifty one-hundredths (66.55) feet; thence south 46 degrees 30 minutes t to a point on the line of land owned by said W. J. Allen sixty (66) feet from the place of beginning; thence south 45 degrees minutes east sixty six (66) feet to the place of beginning, con-ing four hundred and seventy three one thousandths of an acre and (.473) of which thirty one thousands of an acre (.031) is aid lot No. 12, and four hundred and forty two thousandths of acre (.442) is in said lot No. 2 conveying herein a strip of d sixty six (66) feet wide, the center line of which is twenty four) rods from the center line of Front street, measured at right

angles thereto. Parcel Number four. Situated in the Village of Cuyahoga Falls County of Summit, State of Ohio, and known as being a strip of land sixty six (66) feet wide, lying on Front street and the Bailey Road in said Village and bounded and de-
391 scribed as follows; beginning at a point on the south line of land owned by grantors, and on the northerly line of land owned by Fred J. Gilbert distant from the center line of Front street north 50 degrees 35 minutes west three hundred and sixty five and seventy nine one hundredths (365.79) feet on said grantors south line, thence from said point on same line continued sixty six and fifty five one hundredths (66.55) feet, thence north 46 degrees 30 minutes five hundred and twenty eight and sixty five one hundredths (528.65) feet to the center of the Bailey Road thence south 52 degrees 54 minutes along the center of said Bailey Road to land owned by heirs of John T. Ream, deceased, thence south 37 degrees 6 minutes west sixty six and eight tenths (66.8) feet to a point sixty six (66) feet from the above five hundred and twenty eight and sixty-five one hundredths (528.65) feet line; thence south 46 degrees 30 minutes west on a line parallel to and sixty six (66) feet from the said second line herein described to the place of beginning, containing eight hundred and ten one thousandths acres
392 of land (.810) be the same more or less. Conveying herein a strip of land sixty six (66) feet wide, the center line of which is twenty four (24) rods from the center line of Front street, measured at right angles.

Parcel Number five. Situated in the Village of Cuyahoga Falls County of Summit and State of Ohio and known as beginning on the easterly side of the Bailey Road in Lot (12) twelve at a point three hundred and fifty seven and ninety two one hundredths (357.92) feet from the west side of Front street, thence north 52 degrees 54 minutes west sixty six and eighty nine one hundredths (66.89) feet along the side of the Bailey Road, thence north 44½ degrees east on a line parallel to Front street one hundred and ninety four and five tenth- (194.5) feet to land owned by said Traction Company, thence south 32 degrees 54 minutes east along line of said railroad land sixty six and eighty nine one-hundredths (66.89) feet, thence south 44½ degrees east parallel to Front street one hundred and ninety four and one five tenths (194.5) feet to place of beginning and contains twenty nine one hundredths of an acre (29) be the same more or less.

393 Parcel Number six: Situated in the Village of Cuyahoga Falls, County of Summit and State of Ohio, and known as being a part of Lot No. 12 beginning at a stone in the western line of Cuyahoga Falls and Stow Corners Road, which is also the center of Hudson Road, thence north 23¼ degrees west in the center of said Cuyahoga Falls and Hudson Road eight (8) links, thence south 45½ degrees west on line of land formerly owned by Arad Osborne three (3) chains and forty (40) links, thence on said Osborne line 56½ degrees west ninety eight (98) links to a stone marked "B," thence south 36 degrees west on Bailey's line seven (7) chains and ninety one (91) links to a hard stone marked "B" thence on the

rtherly line of the old Stow Road (Bailey's Road) south 55 de-
ees east four (4) chains and ninety (90) links, thence north 44½
grees east on the line of land heretofore belonging to Isadore Hazel
ree (3) chains and thirty (30) links, thence south 43¼ degrees on
d Hazel's line two (2) chains and sixty eight (68) links, thence
on the westerly line of the Cuyahoga Falls and Stow Corners
4 Road north 44½ degrees four (4) chains and forty two (42)
links to the beginning and containing six and fifty two one
ndredths acres of land (6.52) Excepting however from the above
scribed premises one and fifty one hundredths acres of land
.50) conveyed by Nelson S. Porter and wife to John F. Ream by
ed dated September 24th. 1873, and to which reference is made for
more perfect description of said exception. Excepting also from
e above described premises a right of way deed by P. J. Lee
d wife to the Akron Branch of the Cleveland and Pittsburg Rail-
ad of a strip twenty (20) feet wide, each side of the located track
ater. Also excepting from the above a small piece of land lying
t of the railroad and hereto-fore sold to St. Claire Steel.

Parcel Number seven: Situated in the Village of Cuyahoga Falls,
unty of Summit, and State of Ohio, and known as being a part of
ginal lot No. 12 in Stow Township in said County, beginning at
point in the center of the Hudson Road at the Old Village, in
said Village of Cuyahoga Falls four hundred and sixty four
5 and thirteen one hundredths (464.13) feet from the center
of Front street, at the intersection of the said Hudson Road
d said Front street, thence north 44½ degrees east on a line
rallel to Front street three hundred and fifteen (315) feet to land
The Cleveland, Akron and Columbus Railroad Company; thence
uth 14 degrees west along the westerly line of the land of the said
e Cleveland Akron and Columbus Railroad Company to a point
enough to be sixty six (66) feet from the last mentioned line at
ght angles from the same, thence southerly parallel to and sixty
(66) feet from said first mentioned line measured at right
gles to the center of the Hudson Road; thence north 23¾ de-
ees west seventy one and forty three one hundredths (71.43) feet
ng the center of the said Hudson Road to the place of beginning,
ntaining forty one hundredths acres of land (.41) be the same
re or less.

Parcel Number 8. Situated in the Village of Cuyahoga Falls,
unty of Summit and State of Ohio, and known as being part of
Lot No. 12 formerly in Stow Township, and bounded and de-
6 scribed as follows; beginning at a point upon the easterly line
of lands owned by the Cleveland Akron and Columbus Rail-
ad Company in said lot. Said point also being the point where
e line between lands of Sarah J. Steel and V. F. Wagner intersects
d lands of The Cleveland, Akron and Columbus Railroad Com-
ny. Thence south 16 degrees 45 minutes west along lands owned
said The Cleveland, Akron and Columbus Railroad Company
o hundred and seventy five and seven tenths (275.7) feet; Thence
rth 46 degrees 30′ East forty six and five tenths (46.5) feet;
ence north 16 degrees 45 minutes east two hundred and sixteen

(216 feet to lands of V. F. Wagner; thence north 35 degrees 45 minutes west along line between said Wagner and said Sarah J. Steel thirty one and one half (31½) feet to place of beginning and containing fourteen one hundredths of an acre (.14) of land be the same more or less.

Parcel Number nine. Situated in the Village of Cuyahoga Falls, County of Summit, and State of Ohio, and known as being a part of lot No. 12 formerly in Stow Township, beginning at a point in said lot upon the line between the land of Sarah J. Steel and V.
397 F. Wagner, said point being twenty five (25) feet from the easterly line of the lands of The Cleveland, Akron and Columbus Railroad Company when measured at right angles to said Company's line; thence north 17½ degrees east parallel to said easterly line of the land owned by the said Traction Company and twenty five (25) feet therefrom six hundred and seventy nine and sixty six (679.66) feet; thence northeasterly upon an eight degree curve seven hundred and forty five (745) feet to a point on the east line of lot No. 11 and twenty five and seventy one-hundredths (25.70) feet south from the northeast corner of said lot, thence north on lot line between lots Nos. 12 and 13 twenty five and seventy one hundredths (25.70) feet; thence southwesterly upon an eight degree curve seven hundred and forty five (745) feet to land owned by The Cleveland, Akron and Columbus Railroad Company; thence along line of land owned by said Company six hundred and seventy nine and sixty six one hundredths (679.66) feet to line of land owned by Sarah J. Steel; thence along the line of land owned
398 by said Sarah J. Steel to the place of beginning. Said described land being a strip of land twenty five (25) feet wide and contains eighty one-hundredths (.80) of an acre of land be the same more or less.

Parcel No. 10. Situated in the Township of Stow County of Summit and State of Ohio and known as being parts of lots Nos. 13 and 23 in said Township, and is bounded as follows; beginning at a point on the north and south center line of said Lot No. 23, where it intersects the south line of said No. 23, which point is the corner of lands owned by R. H. Lodge and of Lucy J. Cutler and others, thence west on lot line eleven hundred and seven and eighty four one-hundredths (1107.84) feet; thence upon an eight degree curve in the southwesterly direction one hundred and ninety four (194) feet to a point on the west line of lot No. 13, twenty five and seventy one-hundredths (25.70) feet from the northwest corner of said Lot No. 13, thence north on lot line thirty and seventy one hundredths (30.70) feet, thence northeasterly on an eight degree curve and on a line thirty (30) feet distant from first de-
399 scribed line one hundred and ninety four (194) feet; thence easterly parallel to the south line of said Lot No. 23 and thirty (30) feet from the said line eleven hundred and seven and eighty four one-hundredths (1107.84) feet to a point on the north and south center line of said Lot No. 23 thirty (30) feet from the southeast corner of said lot; thence south on lot line thirty (30) feet to the place of beginning, and being a strip of land thirty (30)

t wide across the lands of said grantors and contains eight hundred
d twenty seven one-thousandths of an acre (.827) in said lot No.
and seven one hundredths of an acre (.07) in Lot No. 13 be the
ne more or less.

Parcel Number eleven. Situated in the Township of Stow, County
Summit, and State of Ohio, and known as being a right of way
oss lands of R. L. Lodge in said Township of Stow. Said right of
y being a strip of land twelve (12) feet wide across lands of said
dge to a point distant four hundred (400) feet from the north-
st corner of Lot No. 14 in said Township, from which said point
said right of way is to be twenty four feet wide extending four
0 hundred (400) feet to the corner of said lot No. 14. Said
right of way to be used for railroad purposes forever, and is
re particularly described and set forth in a conveyance made by
d R. H. Lodge and wife to The Akron Bedford and Cleveland
ilroad Company, dated Dec. 26th. 1894, and recorded in the
ords of Summit County, Ohio, Volume 76, page 629, to which said
ord reference is hereby made for a more particular description.

Parcel Number 12. Being known as lands purchased from O. R.
ompson and described as follows; Situated in the Township of
w, County of Summit, and State of Ohio, and known as being
t of lot No. 42 in said Township and bounded and described as
lows; beginning upon the south line of the lands of grantor and
north line of the lands of S. A. Gilbert in said lot, at a point five
ndred and ninety three and one half (593½) feet easterly from
center of the Hudson Road measured along said Gilbert's and
ompson's line; thence northerly upon a 4 degree curve as con-
tinued from the south ninety four (94) feet; thence north
1 four (4) degrees west twelve hundred and seventeen (1217)
feet to a point on the line of lands owned by Henderson Steel
d the north line of the land owned by said grantor. Said point
ng four hundred and forty seven and one half (447½) feet
terly from the center of the Hudson Road measured along said
e between said Steel and Thompson. The line above described
ng the center line of a right of way across the lands of grantors,
d right of way being a strip of land thirty (30) feet wide and
ng fifteen (15) feet wide upon each side of said center line across
lands of said grantor and containing nine hundred and three
-thousandths of an acre of land (.903) be the same more or less.

Parcel Number thirteen. Known as land purchased from Hender-
Steel and bounded and described as follows; Situated in the
wnship of Stow, County of Summit and State of Ohio, and known
being in lot No. — in said Township and beginning at a point
the south line of grantors land in said lot, and upon the north
line of land owned by O. R. Thompson in said lot, said point
2 being four hundred and forty seven and one half (447½)
feet east of the center of the Hudson Road measured along
d dividing line between said Steel and Thompson; thence north
ır degrees west seven hundred and forty seven and one half
47½) feet to the line of lands now owned by the heirs of V. M.
ompson. Said line being also the north line of lands owned by

grantor to a point upon said dividing line two hundred and eighty six and six tenths (286.6) feet east of the center line of said Hudson Road. The line above described being the center line of a right of way across lands of grantor. Said right of way, being a strip of land thirty feet (30) wide and lying fifteen (15) feet wide upon each side of said center line across the lands of said grantors, and contains five hundred and fourteen thousandths of an acre (.514) be the same more or less.

Parcel Number fourteen. Situated in the Township of Stow, County of Summit and State of Ohio, and known as being a part of lot No. 62 in said Township. Beginning at the center of the highway at the southwest corner of said lot No. 62 in said Stow
403 Township. Thence east along center of highway upon lot line between lots nos. 62 and 52 in said Township thirty (30) feet; thence north parallel to lot line No. 62 thirteen hundred and fifty (1350) feet; thence east at right angles to said lot line fifty (50) feet; thence north parallel to said lot line seven hundred (700) feet; thence west fifty (50) feet; thence north parallel to said lot line of lot No. 62 to lands of R. H. Allen on south line of lot No. 72 in said Township; thence west on lot line of said lot No. 72 thirty (30) feet to the west line of said lot No. 62; thence south of said lot line twenty six hundred and five (2605) feet to the southwest corner of said lot and to the place of beginning containing two and forty eight one hundredths acres of land (2.48) be the same more or less.

Parcel Number 15. Situated in the State of Ohio, County of Summit, and Township of Stow and known as being a part of lot No. 52 in said Township, bounded and described as follows; beginning at a point in the center of the road leading from Cuyahoga Falls to Hudson and known as the Diagonal or Payne Road said point being upon the dividing line between lands belonging to the heirs of V.
M. Thompson and lands of R. H. Allen in said lot No. 52;
404 thence south 29 degrees west along road center one hundred and twenty eight feet (128) thence north 3 degrees and 11 minutes west to a point on line of said Allen and Thompson's line one hundred and fifty five (155) feet to a point eighty five (85) feet from the place of beginning; thence along said line of Allen and Thompson south 57 degrees east eighty five (85) feet to place of beginning, and contains one hundred and twenty five one thousandths of an acre (.125) be the same more or less.

Parcel Number Sixteen. Situated in the Township of Stow in the County of Summit and the State of Ohio, and known as being a part of lot No. 82 in said Township, and beginning at a point upon the south line of land now owned by W. Calkins in said lot No. 82 said point being distant from the west line of said lot No. 82 eight hundred and six (806) feet measured along the south line of land owned by said Calkins thence south 6 degrees 49 minutes west four hundred and fifty four and one tenths (454.1) feet; thence southwesterly upon a four degree curve for each one hundred feet for six hundred and ninety two (692) feet; thence south 34 degrees 30

minutes west two hundred and sixty eight and one tenth
405 (268.1) feet to a point on the south line of said lot No. 82, distant four hundred and eight and six tenths (408.6) feet from the southwest corner of said lot No. 82. The line above and herein described being the center line of the right of way of said railroad company, as established staked out and surveyed. Said right of way being a strip of land sixty (60) feet in width for the first seven hundred (700) feet of the above description and a strip fifty (50) feet in width from the remaining distance set forth in the above description and containing one and seventy eight one hundredths (1.78) acres of land be the same more or less.

Parcel Number Seventeen. Situated in the Township of Stow, County of Summit and State of Ohio, and known as being a part of lot No. 82 in said Township, and beginning in the east and west road, on the north line of said Township of Stow, and on the north line of said Lot No. 82 at a point where the Clerking Road in Hudson Township intersects said east and west road; thence southwesterly from said point upon a four degree curve for a distance of two
406 hundred and seventy (270) feet; thence south 5 degrees 30 minutes west to the north line of lands owned by A. H. Allen, in said lot No. 82 said point of intersection of Allen's said line being distant from the west line of said lot No. 82 eight hundred and six (806) feet. The amount of land herein conveyed being a strip of land thirty (30) feet wide from said place of beginning to a point within four hundred and fifty (450) feet of the intersection of said line with said Allen's north line and sixty (60) feet wide from the end of said thirty (30) foot strip for said distance of four hundred and fifty (450) feet to said point upon said Allen's north line. The first line herein described being a center line, running through the center of said strip containing one and twenty one one-hundredths (1.21) acres of land be the same being more or less.

Parcel number eighteen. Also another parcel of land situated in the State of Ohio, County of Summit and Township of Stow, and known as being a part of lot No. 72 in said Township, and bounded and described as follows: commencing upon a point upon the south line of said lot No. 72, fifteen (15) feet from the southwest
407 corner of said lot; thence north parallel to the west line of said lot and fifteen (15) feet therefrom seventeen hundred and fifty one (1751) feet; thence northeast upon a six degree curve five hundred and forty four and six tenths (544.6) feet; thence north 26.5 degrees east four hundred and twenty one (421) feet to a point on the north line of said lot, which point is four hundred and eight and six tenths (408.6) feet from the northwest corner thereof. The line above described being the center line of the right of way and strip of land herein described. Said strip of land being twenty five (25) feet in width upon the east side of said center line for the whole distance across lands of said Allen, and twenty five (25) feet in width on the west side of said center line until it intersects the west line of said lot No. 72 and thence diminishing in width to a point seventeen hundred and fifty one (1751) feet from the south line of said lot No. 72, and thence south for said distance of seventeen hundred and

fifty one (1751) feet to the south line of said lot No. 72; it is fifteen (15) feet wide and contains two and sixty two one hundredths
408 (2.62) acres of land be the same more or less.

Parcel Number nineteen. Situated in the State of Ohio, County of Cuyahoga, and Village of Bedford, and known as beginning in the west line of lot No. 57 in said Township of Bedford, at a point distant north 127.3 feet from the northeast line of Plank Road; thence north 45 degrees 15 minutes east 175.27 feet; thence north 61 degrees 25 minutes west 56.1 feet; thence north 42 degrees west one hundred and four (104) feet to lot line; thence south one degree east 227.48 feet to place of beginning.

Also another parcel of land known as being part of lots 32, 33 and 34 of Langmore's subdivision of lot No. 56 in the Township or village of Bedford, and bounded and described as follows: beginning on the easterly line of said lot No. 34, ninety two (92) feet north 45 degrees 15 minutes east from the north side of Plank Road; thence north one degree west along lot line between lots 56 and 57 two hundred and twenty seven and forty eight hundredths (227.48) feet to the northerly line of said lot No. 32; thence north-
409 westerly along rear of said lot No. 32 twenty five (25) feet; thence south 2½ degrees east two hundred and forty three (243) feet to the place of beginning, said last described line twenty (20) feet westerly from the center line measured at right angles of the Akron, Bedford and Cleveland Railroad track as now staked and located.

Parcel number twenty. Situated in the Village of Bedford, County of Cuyahoga, and State of Ohio, and known as being a part of original lot No. 57 in the Township of Bedford, and known as being a strip of land twenty eight (28) feet wide, twelve (12) feet on the west side, and sixteen (16) feet on the east side of the center line of the track of said grantee, as now surveyed; the center of said track begins at a point in the easterly line of the Plank Road nineteen and nine tenths (19.9) feet from the intersection of the lot line with the said easterly line of said Plank Road; thence north six and one half degrees east thirty two and seven tenths (32.7) feet to a point in the easterly line of sub lot No. 35 and twenty five and two tenths (25.2) feet from the easterly side of said Plank Road; thence north
410 two degrees east, one hundred and thirty one (131) feet to a point on the line between Schwinn and the grantors one hundred and twenty and two tenths (120.2) feet from the side of said Plank road, containing (.1) of an acre of land be the same more or less.

Parcel number twenty one. Situated in the Village of Bedford County of Cuyahoga, and State of Ohio, and known as beginning in the center of Main street two hundred and sixty eight and one half (268½) feet north thirty nine and one half degrees west from a stone monument in the street center and upon the old corporation line; thence at right angles to Main street south 50½ degrees west one hundred and ninety two (192) feet to high water mark of Tinkers Creek; thence south 49 degrees 30 minutes east along high water mark two hundred and six and five tenths (206.5) feet; thence

orth 50½ degrees east one hundred and fifty four and seven tenths
154.7) feet to center of Main street; thence north 39½ degrees west
n street center two hundred and two and five tenths (202.5) feet to
beginning containing seventy eight one hundredths (.78)
11 acres of land, be the same more or less.

Also another piece of land situated in said Village, County
nd State, and known as beginning in the center of Main street sixty
ix (66) feet north 39½ degrees west from a stone monument in the
treet center, and upon the old corporation line; thence at right
ngles to the center of Main street south 50½ degrees west one hun-
red and fifty four and seven tenths (154.7) feet to high water
nark, on right bank of Tinkers Creek; thence south 50 degrees 33
ninutes east along high water mark one hundred and twenty nine
nd two tenths (129.2) feet to stake; thence south 67 degrees 33
ninutes east along high water mark twenty eight and two tenths
28.2) feet; thence north 2 degrees 40 minutes west parallel to
angent line of The Akron, Bedford and Cleveland Railroad and
wenty five (25) feet therefrom to beginning, containing twenty nine
ne hundredths (.29) of an acre, be the same more or less, and being
he same premises conveyed to Guy Gray by Frank W. Landfear and
ife, by war-anty deed, recorded in Vol. 584, page 320, Records of
Deeds, Cuyahoga County Ohio. Also the following easement;
12 the right to construct one or two abutments as at present lo-
cated, between high water mark and low water mark on the
orthery or right bank of Tinkers Creek, and the right to extend
hrough the air across said Tinkers Creek to its southerly or left side
o an abutment there located such iron and steel stringers or spans
nd other materials as may be necessary to construct a bridge across
aid stream not to exceed twenty five (25) feet in width.

Parcel number twenty two. Situated in the City of Akron, County
f Summit and State of Ohio and known as the rear parts of lots
Nos. one (1) two (2) Three (3) and four (4) in Block fifteen (15),
n King's subdivision in said City of Akron, more particularly de-
cribed as follows: All of lot one (1) two (2) three (3) and four
4) as above named, lying west of a line extending from the north
oundary of said lot one (1) one hundred and sixty six and six
enths (166.6) feet westerly from the northeast corner thereof to the
outh boundary of said lot four (4) ninety two (92) feet westerly
from the southeast corner thereof containing about forty three
13 thousand four hundred (43,400) square feet; subject how-
ever to the right of The Cleveland Railroad Construction and
Equipment Company, contained in its deed dated August 28, 1888,
o forever have the railroad tracks now located upon said east portion
upported either by the present sloping embankment at the east side
f the premises above described, or by some adequate artificial sup-
ort erected and maintained at the expense of The Akron Street
Railway and Illuminating Company, its successors or assigns.

Parcel number twenty three. Situated in the City of Akron,
County of Summit, State of Ohio, and known as lot number four
(4), in Solomon Bares' Allotment in track eight (8) in what was
Portage Township, which allotment, made by T. Dwight Paul, and

recorded in Summit County Records Plat Book 3 page 1 on Dec. 2nd, 1874.

Parcel number twenty four. Situated in the Township of Portage, County of Summit and State of Ohio, and known as part of lot number one (1) in tract number eight (8) further described as
414 follows: beginning at a point in the west line of lot number four (4) of Solomon Bare's Addition to the City of Akron, which beginning point is forty eight (48) feet north of the southwest corner of said lot number four (4) and the north line of Wooster Avenue; thence along the west line of said lot number four (4), a distance of one hundred and twelve (112) feet to the northwest corner of said lot number four (4); thence in a continuation of the north line of said lot number four (4), south sixty nine and three fourths degrees west, twenty eight (28) feet; thence south fourteen and one half degrees east, one hundred and five and sixty three one hundredths (105.63) feet to the place of beginning and containing sixty seven one hundredths (.67) of an acre of land.

Parcel number twenty-five. Situated in the Township of Coventry County of Summit, and State of Ohio, and known as being a part of lot number two, in Miller and Long's subdivision of part of lot No. twenty (20), in tract nine (9) in said Township, as surveyed and platted by Hosea Paul Deputy County Surveyer in March
415 1871, and recorded in Summit County Records Plat Book 2, page 54, more particularly described as follows: beginning at the southeast corner of said lot number two (2) in Miller and Long's subdivision of part of lot number twenty (20) in tract nine (9); thence north along the east line of said lot number two (2), one hundred and ten (110) feet; thence west and at right angles with the east line of said lot number two (2), one hundred and forty (140) feet; thence north and parallel to the east line of said lot number two (2) eighty two and one half (82½) feet; thence west along the north line of said lot number two (2) one hundred and twenty four (124) feet, to the northwest corner of said lot number two (2); thence south along the west line of said lot number two (2), one hundred and ninety three and one half (193½) feet; thence east along the south line of said lot number two (2), two hundred and sixty four (264) feet to the place of beginning. This grant presumes that the south line of lot number two (2) is the center of Miller Avenue, and a strip (30) thirty feet wide is reserved
416 off the south side of this grant for Miller Avenue, and the east line of said lot number two (2) is presumed to be the west line of Main street.

Parcel number twenty six. Situated in the City of Akron (formerly in the Township of Coventry) County of Summit and State of Ohio, and known as being the whole of lots numbers two (2) and four (4) in a subdivision of part of lot number thirteen (13) in tract nine (9) in said Township, made for Putt and Day, and recorded in Summit County Records Plat Book 3, page 9, and also a part of lot number five (5), in said subdivision described as follows: beginning at the southeast corner of said lot number five (5); thence westerly along the north line of said lot to the southwest corner of

said lot number two (2) a distance of two hundred and twenty one (221) feet; thence southerly in a continuation of the west line of said lot number two (2) three (3) feet; thence easterly, parallel to the north line of said lot number five (5) to the west line of Main street; thence northerly along the west line of Main street to the place of beginning.

417 Parcel number twenty seven. Situated in the City of Akron, County of Summit and State of Ohio, and known as being lots numbers six (6) and seven (7), in Block number sixteen of King's addition to Akron, as the same was surveyed and numbered by Albert G. Mallison said lot number six (6) being subject to right of The Akron Canal & Hydraulic Co. and the owners of the mills that are propelled by the waters of the Cascade Race so called, to convey across said lot by free and unobstructed raceway, all waters by it or them conveyed through its race to said lot, both by main or head race and by tail race excepting and reserving however so much of said lot number six (6) as will be necessary and required for the construction and maintainance of a single track railway across said premises. Also excepting and reserving from said lot number seven (7) the privilege of conducting all or any part of the waters of the Cascade Mill Race through or across any part of said lot, but doing no unnecessary damage, and all the rights of the State of Ohio for canal purposes. Also excepting and reserving a small strip off the east end of said lot number seven (7) heretofore deeded

418 to the Valley Railway Company; and said lot number seven (7) is subject to a certain party wall contract between the Citizens Electric Light Company and said The Valley Railway Company dated September 1st, 1888.

Parcel number twenty eight. Situated in the Township of Hudson, County of Summit, State of Ohio, and known as being part of lot 2 and described as follows: beginning at a point on the Township line and on the center line of the road running northerly through lot 2; thence north 20 degrees west along the center line of said road 1445 feet; thence south 42 degrees 20 minutes east, along the prolongation of the north line of a road running northwesterly 176 feet; thence south 20 degrees east along a line parallel to the center of said road and 70 feet therefrom 977.25 feet; thence south 12 degrees, 17 minutes east 327 feet to the center of the Township Road; thence westerly along the center of the Township Road 30.5 feet to place of beginning. Contains 2.22 acres of land. Also; beginning at the south-

419 west corner of said lot 2 in said Township of Hudson and running south along lot line 63 feet to Station 1; thence southerly along a curve having a radius of 971 feet (which curve is concentric with and fifteen feet from the center of the Northern Ohio Traction Company track) 345 feet to Station 2; thence south 19 degrees 20 minutes east, 1085 feet to Station 3; thence south 42 degrees 20 minutes east along a prolongation of the north line of a road running northwesterly 103.75 feet to Station 4; thence north 20 degrees west, 1185 feet to Station 5; which is opposite Station 2, and is 5630 feet at right angles therefrom; thence northerly along a curve having a radius of 1885 feet and concentric with and

25 feet from the new located line of The Northern Ohio Traction Company 365 feet to Station 6; thence west along lot line 127.10 feet to beginning and contains 2 acres of land.

Parcel number twenty nine. Situated in the Township of Hudson, County of Summit, State of Ohio, and known as being a part of lot 12, and described as follows: 1. Beginning at the southwest
420 corner of said lot 12; thence northerly along the west line of said lot 512 feet; thence easterly at right angles to said west line 60 feet; thence southerly along a curve having a radius of 1940 feet and concentric with and thirty feet from the new located line of The Northern Ohio Traction Company to the south line of lot 12; thence westerly along south line of lot 12, 118 feet to beginning and contains 1.38 acres of land. 2. Also a part of lot 12, beginning at a point in the line of said lot, 512 feet north from the southwest corner thereof thence northerly along west line of said lot 12, 2245 feet to the north line of Thompson's and south line of F. A. Holcomb; thence east 60 feet; thence southerly parallel to and 60 feet east of west line of lot #12, 2245 feet; thence west at right angles to said parallel line, 60 feet to beginning conveying a strip of 60 feet in width along lot line and contains 3.09 acres of land.

Parcel number thirty. Situated in the Township of Hudson, County of Summit and State of Ohio, and known as being part of lot- 11 and 21 and bounded and described as follows: be-
421 ginning on the east line of lot 21 and in the center of the highway running through said lot; thence northwesterly along said road center about 301 feet to a point in a curve having a radius of 1940 feet, and concentric with the new located line of The Northern Ohio Traction Company and 30 feet therefrom; thence in a southeasterly direction along a curved line having a radius of 1800 feet, and concentric with and 30 feet westerly from the new located line of The Northern Ohio Traction Company about 1020 feet to east line of lot 11; thence north on east line of said lots 11 and 21, 827.50 feet to beginning and contains .37 acres in lot 11, and 1.49 acres in lot 21.

Parcel number thirty one. Situated in the Township of Hudson, County of Summit, and State of Ohio and known as being a part of lot 21 and described as follows: being a strip of land 60 feet wide, extending across grantor's farm from the center of the highway running along grantors south line to north line of his farm.
422 The center line of said strip of land is the new located line of The Northern Ohio Traction Company. Said strip being 30 feet on each side of said located line. Said center line begins at a point 251 feet westerly from east line of lot 21, measured along the center of the highway; thence northwesterly along a curve having a radius of 1910 feet, a distance of 285 feet; thence north 37 degrees 30 feet west, 2498 feet to the north line of lot 21, and contains 3.84 acres of land.

Parcel number thirty two. Situated in the Township of Hudson, County of Summit, State of Ohio, and known as being part of lot 31 in said Township, bounded as follows: beginning on the south line of lot 31 at the southwest corner of grantor's land; thence north

ong the east line of Conway's land 145 feet; thence in a southerly
rection on a line 40 feet distant from and parallel to the center
ne of the new located right of way of The Northern Ohio Traction
ompany, to the south line of said lot 31, 208 feet; thence westerly
ong the south line of said lot, 130 feet to beginning and contains
22 of an acre of land.

Parcel number thirty three. Situated in the Township of Boston
and Hudson, County of Summit, State of Ohio and known
23 as: 1. Being part of lot 31, in Hudson Township, and is a
strip of land 60 feet wide, the center line of which is the new
cated line of The Northern Ohio Traction Company, said located
ne across Conway's east line at a point 100 feet north of south line
lot 31, and 783 feet east of the west line of said Township and runs
orth 37 degrees 30 minutes, west 1266 feet to the west line of said
ownship and contains 1.75 acres.

2. Being part of lot 6, Boston Township and described as follows:
eginning at a point on the south line of the school lot, 99 feet at
ght angles from the center of the Hudson and Peninsula Road, and
) feet at right angles easterly from the center of the State Road;
ence south 26 degrees 47 minutes east along the east line of the
ate road 322 feet; thence south 37 degrees 30 minutes east parallel
and 30 feet at right angles westerly from the center line of the
orthern Ohio Traction Company's new located line about 1425
et to the east line of said Township; thence north along Township
ne 98 feet; thence north 37 degrees 30 minutes west about 1250
feet, along a line parallel to and 30 feet easterly from said
24 located line; thence northerly along a curve having a radius
of 2262 feet, a distance of 375 feet to a point 119 feet at right
ngles from the center of the Hudson and Peninsula Road; thence
orthwesterly about 27½ feet to a point which is 99 feet at right
ngles from center of road and 65 feet at right angles from the
enter of the State Road; thence south 77 degrees 45 minutes west
arallel to the center of the Hudson and Peninsula Road to the be-
inning and contains 2.32 acres of land.

Parcel number thirty four. Situated in the Township of Portage,
ounty of Summit and State of Ohio and known as tract #3, lot
#5 beginning at an old sandstone monument set in the east line of
id lot at a point 100.4 feet north of the center line of the Akron
nd Cuyahoga Falls Road; thence south along east line of said lot
00.4 feet; thence south 69 degrees 15 minutes west 150 feet along
enter line of said road and southerly line of the J. H. Smith tract;
hence north parallel to the east line of said lot 33. 4 feet to a point
in the northerly line of said road; thence north 48 degrees
25 45 minutes east 189.78 feet to the beginning, containing 2.07
acres.

Parcel number thirty five. Situated in the Village of Cuyahoga
alls, County of Summit and State of Ohio, and known as part of
ot 12 formerly of Stow Township bounded and described as follows:
eginning at a point in the north line of the Bailey Road marked
ith a hard stone; thence southerly along the north line of the old
Bailey Road to the west line of The Northern Ohio Traction Com-

pany's right of way; thence northerly along the west line of The Northern Ohio Traction Company's right of way to the south line of M. Coffman's land; thence westerly along the south line of said Coffman's land to the east line of E. Tremlin's land; thence southerly along the east line of E. Tremlin's land to the place of beginning containing about ¼ of an acre of land.

Parcel number thirty six. Situated in the Village of Cuyahoga Falls, County of Summit and State of Ohio. Beginning at a sewer pipe set in the north line of land of Henry A. Everett and
426 south line of grantor at the intersection of the center line of South Front street; thence easterly along the Everett and Grant line about 381.7 feet to sewer pipe; thence northeasterly parallel with Front street and 230 feet from the center line thereof 93 feet to a stake; thence northwesterly at right angles, to Front street 230 feet to the center line of Front street; thence southwesterly along the center line of Front street, 165.4 feet to a sewer pipe; thence southwesterly still in the center line of Front street 134 feet to the place of beginning and containing 1.08 acres exclusive of Front street. 2. Beginning at a point where the old Township line between Tallmadge and Portage intersects the south line of south Front street; thence southerly along the east line of Front street, 899 feet to the north line of the (Parcel one) above described; thence easterly at right angles to Front street 20 feet; thence northerly parallel with the east line of Front street and 20 feet therefrom 50 feet; thence westerly at right angles to Front street 12 feet; thence
427 northwesterly parallel with Front street and 8 feet distant therefrom to the old Township line; thence north along the said Township line; thence north along the Township line about 10.25 feet to the place of beginning.

Parcel number thirty seven. Situated in the Township of Coventry, County of Summit and State of Ohio, and known as being part of lot 10, tract 2, west of the Portage Path, and described as follows: beginning at a sewer pipe set in the north line of said lot, said sewer pipe being south 86 degrees 39 minutes 30 seconds, east 231.83 feet from a stake in said line at the northeast corner of land sold by said George W. Foust to William H. Johnston, by deed dated November the 1st, 1899, and recorded in Volume 256, page 286 Summit County Records of Deeds; thence south 13 degrees 11 minutes 30 seconds, west 95.5 feet to a stake; thence along a circular curve of 628.68 feet radius to the right 440.57 feet measured in four chords of 100 feet each and one of 40.57 feet to a stake; thence north 3 degrees 22 minutes east along the east line of said William A. Johnston, 147.85 feet; thence along a circular curve concentric with the above mentioned curve with a radius of 523.68 feet, 271.05 feet measured in two chords of 100 feet each and one chord of 71.05
428 feet; thence north 13 degrees 11 minutes, 30 seconds, east 77.27 feet to the north line of said lot; thence south 86 degrees, 39 minutes, 30 seconds east along said lot line and road center 106.57 feet to the place of beginning and containing as surveyed by S. G. Swigart, Surveyer 1.066 acres of land.

Parcel number thirty eight. Situated in the Township of Coventry,

unty of Summit and State of Ohio, and known as being part of
#4 tract #1, in said Township, and described as follows: being
trip of land 30 feet wide, 15 feet on each side of the following de-
ibed center line. Beginning at a point in the northeasterly line
said grantor's land, which is north 59 degrees 20½ minutes east
.94 feet from the most easterly corner thereof which corner is 43
t distant at right angles from the center of the main track of the
ie Railroad; thence along a circular curve of 955.37 feet radius to
e right 290.63 feet; thence south 53 degrees 14½ minutes west,
802.2 feet to the center of Mud Run Ditch, which is the
9 southwesterly line of said grantor's land, said strip of land
containing .753 of an acre of land.

Parcel number thirty nine. Situated in the Township of
ventry, County of Summit and State of Ohio, and known as being
rt of lots 18 & 19 in tract 10 of said Township and described as
llows; To-wit; beginning at a point in the east line of land deeded
Julia Brodt by deed dated July 12th, 1895 and recorded in Book
8, page 236 of Summit County Records and north 1 degree 35
inutes, west 24.54 feet from the north line of said lot 19 feet;
ence south 53 degrees 23 minutes west 642.61 feet to the west line
lot deeded by George Brodt to Henry E. Shook; thence north
degrees, 10 minutes east along said west line 87.37 feet; thence
uth 5 degrees 49½ minutes east 64.49 feet; thence north 53
grees 23 minutes east 530.4 feet to the east line of said land deeded
Julia Brodt; thence north 1 degree 35 minutes west along said
st line 122.12 feet to the place of beginning and containing 1
235/1000 acres of land, which .005 acres is in lot 19, and
0 1 23/1000 acres in lot 18, being a strip of land 100 feet
wide, 50 feet on each side of a line surveyed for an electric
ilroad from Akron to Barberton. Also the following described
emises: Situated in the Township of Coventry, County of Summit
d State of Ohio, and known as being part of lot 18, in tract 10
said Township, and described as follows, to wit; beginning in the
nter line of the Akron and Manchester road as now traveled at the
uthwest corner of land deeded to George Brodt, by deed dated
ly 5th, 1895 and recorded in book 218, page 153 of Summit
unty Records of Deeds, which beginning point is 511.5 feet south-
ly along said center line of road from the north line of said lot;
ence north 84 degrees 10 minutes east along the south line of said
odt's land 86.63 feet; thence north 53 degrees 23 minutes east
.77 feet; thence south 84 degrees, 10 minutes west 124.38 feet to said
nter line of road; thence south 5 degrees 49½ minutes east along said
nter line of road 225 feet to the place of beginning and containing
0.54 acres of land. Also the following described premises
31 Situated in the Township, County and State — and known as
being a part of lot 18, in tract 10 of said Coventry Township
nd described as follows, to wit; beginning at the southwest corner of
nd deeded by George Brodt to Henry E. Shook by deed dated the
6th. day of September 1898; thence northerly along the west line
said Shook's land to the northwest corner thereof; thence westerly
the center of the Akron and Manchester Road; thence southerly

along said road center 91.66 feet; thence easterly to the place of beginning and containing about .06 acres of land.

Parcel forty. Situated in the Township of Coventry County of Summit, State of Ohio. 1. Known as being a part of lot 7 tract 2 in said Township and described as follows; beginning in the center of the Akron and Manchester Road at the northwest corner of land sold to said William Watters, by deed dated March 16" 1889 and recorded in Book 172, page 246 of Summit County Records; thence north 87 degrees 33 minutes west along the north line thereof 164.16 feet; thence following a curve 1382.7 feet
432 radius parallel to and 50 feet distant from the center line of a proposed electric railroad as surveyed 30.07 feet to a point in the west line of said William Watters' land 18.53 feet south 5 degrees 49½ minutes east from the northwest corner thereof; thence along said west line south 5 degrees 109.51 feet; thence along a curve of 1482.7 feet radius parallel to and 50 feet distant from the center line of said proposed electric railroad as surveyed 198.78 feet; thence north 53 degrees 23 minutes west parallel to and 50 feet distant from said proposed center line of said proposed electric railroad 14.39 feet to the center line of said Akron and Manchester Road; thence north 5 degrees 49½ minutes west along said road center 32 feet to the place of beginning and containing .284 acres of land in William Watters. 2. Known as being a part of lot No. 18 tract 10 of said Township, and described as follows; beginning at the northerly corner of land deeded to said Priscilla Watters by deed dated January 21st. 1880, and recorded in Book 117, page 544 of Summit County Records of Deeds; thence north 84 degrees 10 minutes east along the northerly line of said Priscilla Watters' land 86.63
433 feet; thence south 53 degrees 23 minutes west parallel to and 50 feet distant at right angles from the center line of a proposed electric railroad as surveyed 100.8 feet to the center of the Akron and Manchester Road; thence north 5 degrees 49 minutes west along said road center 51.6 feet to the place of beginning and containing .05 acres of land fee in Priscilla E. Watters.

Parcel number forty one. Situated in the Township of Coventry, County of Summit, and State of Ohio. 1. Known as being part of lot 18 in tract #10 in said Township and described as follows; beginning in the east line of the Akron and Manchester Road and on the north line of Wingter street 137.50 feet south of the north line of George Brodt's land, as owned by him October 1st. 1898; thence north 83 degrees 45 minutes east, 140 feet along the north line of Wingters street; thence north 6 degrees 15 minutes west 43.83 feet; thence south 83 degrees, 45 minutes west 140 feet; thence south 6 degrees 15 minutes east 45.83 feet along the east line of said road to the place of beginning containing 1.47 acres.

434 2. Known as being part of lot 18, in tract 10 and described as follows; beginning in the east line of the Akron and Manchester road 91.66 feet south of the north line of George Brodt's land, and 45.83 feet north of the north line of Wingter street; thence north 6 degrees 15 minutes west 45.83 feet; thence south 83 degrees, 45 minutes west 140 feet; thence south 6 degrees 15 minutes east

83 feet along the east line of said Akron and Manchester Road
he place of beginning and containing .147 acres.
Parcel number forty two. Situated in the Township of Coventry,
unty of Summit and State of Ohio, and known as being part of
7, tract # 2 of said Township and described as follows: begin-
g at the southeast corner of land sold to said grantor by George
tmer by deed dated the 18th day of August 1888, and recorded
Book 168, page 290 of Summit County Records; thence north
degrees 33 minutes west along the south line thereof 164.16 feet;
nce following a curve of 1,382.7 feet radius, in a northeasterly
direction parallel to and 50 feet distant from the center
line of a proposed electric railroad as surveyed 111.59 feet;
thence still parallel to and 50 feet distant from said center
e of said electric railroad as surveyed north 53 degrees 23 min-
s east, 73.99 feet to the center of the Akron and Manchester
ad; thence south 5 degrees 49½ minutes east along said road
ter 113.2 feet to the place of beginning and containing .211
an acre of land.
Parcel number forty three. Situated in the Township of Portage,
unty of Summit and State of Ohio, and known as part of tract 6,
t of Portage Path and described as follows: beginning at a stone
the east line of said Township at the southeast corner of what is
own as the Frederick Fouse farm; thence along said Township
e north 3 degrees east, 61 67/100 feet; thence west parallel to
th line of said Frederick Fouse farm 176 05/100 feet to the cen-
of a street 45 feet wide, provided for in a deed, said deed re-
ded in Summit County Records, Book 235, page 588; thence
th 3 degrees west along the center of said street 61 67/100 feet;
thence south 87 degrees 2½ minutes east 176 05/100 feet
to the place of beginning and containing ¼ of an acre of
land.
Parcel number forty four. Situated in the Township of Portage
unty of Summit, and State of Ohio, and known as part of tract 6
t of Portage Path, and described as follows: beginning at a stone
the east line of said Township at the southeast corner of what is
own as the Frederick Fouse farm; thence along said Township
e north 3 degrees east 61 67/100 feet; thence west parallel to the
th line of said Frederick Fouse farm 176 05/100 feet to the
ter of a street 45 feet wide provided for in a deed, said deed
orded in Summit County Records, Book 235, page 588; thence
legrees west along the center of said street 61 67/100 feet; thence
th 87 degrees 2½ minutes, east 176 5/100 feet to the place of
ginning and containing ¼ of an acre of land.
Parcel number forty five. Situated in the Township of Portage
v Akron, Summit County and State of Ohio and known as the
whole of lot # 8 in block # 40 in Perkins' addition to the
town plat of Akron as surveyed by H. Paul, Surveyor and
recorded in the records of Summit County Ohio, Plat Book
page (48). Also another parcel of land known as all of lot 9,
ck 40 in Perkins' Addition to Akron.
Parcel number forty six. Situated in the Township of Coventry,

County of Summit and State of Ohio, and known as all that certain strip or parcel of land situated in the aforesaid Township, County and State, and further known as being part of lots 8, 9 & 10 in Range 11, tract 2 of said Coventry Township and described as follows: a strip of land 25 feet wide measured at right angles from the west right of way line of the New York, Pennsylvania and Ohio Railroad Company property and running parallel from the north side of the Public Road known as the Triplett Road to the north property line of the grantor, containing 907/1000 acres.

Parcel number forty seven. Situated in the City of Akron, County of Summit and State of Ohio, and bounded and described as follows, to wit: northeasterly by the thread of the Little Cuya-
438 hoga River, southerly by the northern line of North street in said City of Akron, and westerly by a line drawn to the thread of the Little Cuyahoga River, at right angles to said North street from an iron pin set at a point on the northerly line of said North street; about one hundred and sixty nine (169) feet westerly measured along the northerly line of said North street, from a point where said northerly line of North street strikes the most westerly part of the bridge across said Cuyahoga River at said North street.

Parcel number forty eight. Situated in the City of Akron, County of Summit, State of Ohio, and known as part of Block # 41 Perkins' Addition. Beginning at an iron pin in the north line of Furnace street and 119.6 feet easterly from a sandstone which stone is also on the north line of Furnace street, and the south line of the said block # 41 Perkins; thence north 9 degrees, no minutes east, 74.8 feet to the south bank of the Little Cuyahoga River; thence south 58 degrees 58 minutes east, along the south bank of the said
439 river 182.16 feet; thence south 64 degrees 20 minutes west 53½ feet to the north line of the said street; thence north 77 degrees 53 minutes west along the said north line 149 feet to the place of beginning and containing 243/1000 acres of land.

Parcel number forty nine. Situated in the town of Barberton, County of Summit and State of Ohio, and known as being lot # 590 of Barberton, Summit County, Ohio, as platted by Charles Baird and recorded March 24th 1891, in Plat Book 6, pages 12, 13, 14, and 15 of the records of Summit County, Ohio.

Parcel number fifty. Situated in the Township of Coventry, County of Summit, and State of Ohio and known as being a strip of land lying along the west line of the right of way of the N. Y. P. & O. Ry. Co. and extending from the Manchester Road along said right of way to property belonging to A. J. Triplett, said strip of land being 12 feet in width upon said Manchester Road and 16 feet in width adjoining land of A. J. Triplett, measuring from the right of way of said railroad company and being part of lot 8, tract 2, of said Coventry Township.

Parcel number fifty one. Situated in the Township of
440 Coventry, County of Summit and State of Ohio, and known as being part of lot 19 in tract 9, and described as follows: beginning at Frank King's northwest corner on the east line of the Towing Path of the Ohio Canal; thence south 38 degrees east along

the line between Miller and King 265.50 feet; thence south 42 degrees west, parallel to and 40 feet at right angles easterly from the located line of the Northern Ohio Traction Company about 315 feet to the east line of said Towing Path; thence north 12 degrees west along the east edge of the tow path about 251 feet to the beginning and containing 0.735 of an acre of land.

Parcel number fifty two. Situated in the Township of Stow, County of Summit and State of Ohio, and known as being a part of lot #33 of said Township, and bounded and described as follows: beginning in the center of the road at a point which is found by commencing at the northeast corner of said lot and running west on the lot line 6 chains, 35 links, and thence south parallel with the east line of the lot, 3 chains 76 links; thence westerly in the center of said road 9 chains 50 links to land of George Hart; thence 1 degree, east 10 chains, 39 links to the banks of the
441 Little Pond or Crystal Lake; thence along the waters edge south 43 degrees east 1 chain, 50 links, south 2 degrees east 2 chains, 50 links and south 9 degrees west 1 chain 72 links to land deeded to W. L. Hanford by Albert Atkins et al, book 27, page 242; thence south 15 degrees 45 minutes east, 11 chains 8 links; thence north 69 degrees 15 minutes east 9 chains 41 links to the edge of the Stow Pond or Silver Lake; thence north 44 degrees 30 minutes east 3 chains; thence *thence* no degrees 52 minutes west along the center of road to the place of beginning and containing about 36.75 acres of land.

Parcel number fifty three. Situated in the Township of Franklin, County of Portage and State of Ohio, commencing at a point in the line between property of Moody and Osborn and grantors, 60 feet southerly of the center line of grantees right of way as now located; thence easterly parallel to said center line and 60 feet distant therefrom to the intersection of the highway; thence westerly along the southerly line of the highway to the land of Moody
442 and Osborn; thence southerly along the line between Moody and Osborn and grantors to the place of beginning.

Parcel number fifty four. Situated in the Township of Franklin, County of Portage, State of Ohio; being a parcel of land in large lot 40, and being all the land we own in said lot, south of the road leading from Kent to Brady Lake, and containing about one acre.

Parcel number fifty five. Situated in the Township of Franklin, County of Portage and State of Ohio, being a part of lot No. 39 and bounded by commencing at grantors southeast corner in the center of the highway known as the Lake Brady Road; thence northerly on grantors east line 55 feet; thence westerly parallel to the center line of said highway to grantors west line and 55 feet distant from said center line of said highway; Thence southerly on grantors west line to the center of said highway; thence easterly along the center line of said highway to the place of beginning being a strip of land off of the south end of grantors 7 and 83/100 acre tract.

443 Parcel number fifty six. Situated in the Township of Franklin, County of Portage, State of Ohio, part of lot 39

bounded and described as follows:—beginning at a point in the center of the highway usually known as the Lake Brady Road, which point is in the lot line between lots 38 and 39; thence westerly parallel with said Lake Brady Road and 45 feet distant therefrom; 1060 feet to a point in the center of the highway extending from Lake Brady Road to the Ravenna and Hudson Road; thence along the said last mentioned road 45 feet to the center of the Lake Brady Road; thence along the center of said Lake Brady Road 1060 feet to the place of beginning containing 1 and 9/100 acres.

Parcel number fifty seven. Situated in the Township of Franklin, County of Portage, State of Ohio and known as part of lot #37 and bounded by beginning in the east line of said lot where the same intersects the center of the highway; thence north 45 feet; thence westerly parallel with the center of the highway forty five (45) feet distant therefrom to the east line of Marvin Kent's land;
444 thence south to the center of said highway; thence east along the center of said highway to the place of beginning, containing 2 4/100 acres.

Parcel number fifty eight. Situated in the Township of Ravenna, County of Portage, State of Ohio, and known as part of lot No. 50 in the south division of lots and bounded by beginning in the center of the highway at the southwest corner of said lot; thence north along the west line of said lot and Township 45 feet; thence east parallel with the center of said highway 20 chains 91 links, to the west line of lands of James Wilson; thence south 45 feet to the center of said highway; thence west along the center of said highway to the place of beginning, containing 1 and 42/100 acres.

Parcel number fifty nine. Situated in the Township of Ravenna, County of Portage, State of Ohio, and known as part of lot 50 in the south division of lots in said Township, and bounded by beginning 9 chains 68 links west of the east line of said lot and at the southwest corner of Mary Ender's land; thence south 89 degrees,
445 west along the south line of said lot and in the center of the highway 11 chains 23 links to lands formerly belonging to John Cutler; Thence north 1 degree 30″ east 45 feet; thence north 89 degrees east parallel with the center of said highway and 45 feet distant therefrom to the west line of said Mary Ender's land; thence southerly along the said Mary Ender's land to the place of beginning containing 66/100 acres.

Parcel number sixty. Situated in the Township of Ravenna, County of Portage and State of Ohio, and known as a part of lot 50 in the south division of lots in said Township and bounded by beginning at the southeast corner of said lot and in the center of the highway; thence west along said lot line and the center of said highway 9 chains, 68 links to lands of James Wilson; thence north along said Wilson's east line to a point 45 feet north of and at right angles with the center of said highway; thence east parallel with the center of said highway and 45 feet distant therefrom to the west line of lands of S. E. Slaughter, being the east line of said lot; thence
446 south along said line 45 feet to place of beginning and containing 66/100 acres.

Parcel number sixty one. Situated in the Township of Ravenna, County of Portage, State of Ohio, and known as being part of lot No. 51 in the south division of lots and is bounded by beginning at the southwest corner of said lot in the center of the highway; thence north 45 feet; thence east parallel with the center of said highway 16 chains, 8 links to the west line of lands of Frederick Almondinger; thence south 45 feet to the center of said highway; thence west along the center of said highway to the place of beginning, containing 1 and 9/100 acres.

Parcel sixty two. Situated in the Township of Ravenna, County of Portage, State of Ohio. 1. Known as being part of lot 51 in the south divisions of lots in said Township and bounded by (First tract) beginning at the southeast corner of said lot, thence north on lot line 45 feet; thence west parallel with the south line of said lot
15 chains 58 links to the east line of lands of Frederick Al-
447 mondinger; thence south 45 feet to the south side of said lot;
thence east along said lot line to the place of beginning containing 1 and 6/100 acres. 2. Being part of lot #44 in said south division of lots and bounded by beginning at the northwest corner of lands deeded to said grantors by William A. Eatinger and wife June 10" 1901, beginning on the east line of grantor's land and 47½ feet distant measured at right angles with the center of the Red Brush Road; thence northwesterly by an eight degree curve from a tangent parallel with said Red Brush Road to the north line of said lot; thence east on said lot line to the east line of grantor's land; thence southwesterly along the east line of grantors land to the place of beginning containing about 40/100 of an acre.

Parcel number sixty three; Situated in the Township of Ravenna, County of Portage, State of Ohio, and known as part of lot No. 51 in the south division of lots and bounded by beginning at a point in the center of the highway on the south line of said lot at the southeast corner of lands of S. E. Slaughter thence north 45 feet; thence
east parallel with the center of said highway about 60 feet
448 to the west line of lands of Jacob Almondinger; thence south
45 feet to the center of said beginning; thence west to place of beginning and containing 6/100 acres.

Parcel number sixty four. Situated in the Township of Ravenna County of Portage, State of Ohio, known as part of lot #45 in the south division of lots in said Township, and bounded by beginning at the southwest corner of said lot; thence north along the west line of said lot 45 feet; thence east parallel with the south line of said lot 240 feet; thence south 45 feet to the south line of said lot; thence west along said lot line 240 feet to the place of beginning.

Parcel number sixty five. Situated in the Township of Ravenna, County of Portage, State of Ohio, and known as part of lot #41 in the south division of lots bounded by beginning in the center of the Red Brush Road at the northwest corner of lands of Jacob Almondinger; thence southwesterly along the line between the
lands of said Almondinger's and grantors to a point
449 47½ feet distant from the center of said road measured at
right angles therewith; thence south 43 degrees east along

a line parallel with the center of said road and 47½ feet distant therefrom, about 10 chains to the westerly lands of Laura C. Mooney; thence along the line of said Mooney's land to the center of said highway; thence north 43 degrees, west along the center of said highway to the place of beginning containing about 72/1000 acre.

Parcel number sixty six. Situated in the Township of Ravenna, County of Portage and State of Ohio, and known as part of lot #44 in the South division of lots in said Township and bounded by beginning in the center of the Red Brush Road at the west line of lands of Katherine Hahn; thence north 43 degrees west along the center of said highway about 17 chains 83 links to lands of William A. Eatinger; thence westerly along the line of said Eatinger's and grantors land to a point 47½ feet distant from and at right angles with the center line of said road; Thence south 43 degrees, east parallel with the center of said road and 47½ feet distant
450 therefrom to the west line of Katherine Hahn's land; thence north along the west line of said Hahn's land to the place of beginning containing about one and 28/100 acres.

Parcel number sixty seven. Situated in the Township of Ravenna, County of Portage and State of Ohio, and known as part of lot #44 and bounded by beginning in the center of the Red Brush Road at the northeast corner of lands of Laura C. Mooney; thence south no degrees, 30 minutes west along the line of said Mooney's land to a point 47½ feet distant from and measured at right angles with the center of said road; thence south 43 degrees east along a line parallel with said road and 47½ feet distant from the center thereof 915 feet; thence by a curve to the east of (11) degrees about 200 feet to the center of said road; thence north 43 degrees west along the center of said road to the place of beginning containing 1 15/100 acres of land.

Parcel number sixty eight. Situated in the Township of Ravenna, County of Portage and State of Ohio, and known as a part of lot 44 in the South Division of lots of said Township and bounded by beginning at the southeast corner of said lot; thence north along
451 the lot line to the north line of the Ravenna and Newark State Road; thence westerly by a curve to the north of (11) degrees from the tangent formed by the north line of said State road to the center of the Red Brush Road; Thence southeasterly along the center of said last mentioned road to the south line of said lot; thence east along said lot line to place of beginning containing about 10/100 acres.

Parcel number sixty nine. Situated in the Township of Franklin, County of Portage and State of Ohio, and known as part of lot #39 and bounded by beginning in the center of the Lake Brady Road at its intersection with the Red Brush Road; thence south 74 degrees, 20 minutes west along the center of said Lake Brady Road; 103 1-5 feet to the west line of said grantors' land; thence north, 3 degrees west to a point 10 feet north of the north line of said Lake Brady Road; thence north 74 degrees 20 minutes east parallel with said last named road to the center of said Red Brush Road; thence

south 3 degrees east along the center of said Red Brush Road
452 to the place of beginning. Also the following electric street railroad lines to wit; in and along the following streets in and about Akron, Summit County Ohio. First; in and along Main street, southerly from Market street to the south corporation line of the City of Akron; thence in Coventry Township in Main street extension southerly to Miller Avenue. Second; In and along east and West Market streets, commencing at the west corporation line of the City of Akron; thence southerly along West and East Market streets, to the east corporation line; thence northerly to Blue Pond. Third. In and along Mill street easterly from the center of South Howard street, to the center of College street. Fourth. In and along College street, from the center of Mill street southward, to the center of Buchtel Avenue. Fifth. In and along Buchtel Avenue from the center of College street easterly to the center of Spicer street. Sixth. In and along Spicer street, from the center of Buchtel Avenue, southerly to the center of east Exchange street. Seventh.
In and along East Exchange street westerly from Spicer
453 street to South Main street, and in and along West Exchange street from Main street westerly to South Maple street. Eighth. In and along South Maple street, southwesterly from the center of West Exchange street to the west corporation line of the City of Akron. Ninth. In and along Bowery street from the center of West Exchange street to the center of Wooster Avenue. Tenth. In and along Wooster Avenue from the center of Bowery street, southwesterly, to the west corporation line of the City of Akron. Eleventh. In and along Grant street from the center of East Exchange street southerly to South street. Twelfth. In and along Long street, westerly from the center of South Main street in Coventry Township to Summit Lake. Thirteenth. In and along South Howard street, from Market street southerly to its intersection with South Main street. Fourteenth. In and along North Howard street, from the center of Market street, northerly to the north corporation line of the City of Akron and extending over North Howard street
Extension and Cuyahoga Falls Avenue, through the Town-
454 ship of Portage, to the south corporation line of the village of Cuyahoga Falls; thence westerly in Portage street to Second street in said village. Intending to include herein all street railways of the grantors whether herein enumerated or not, all franchises to construct additional lines and all extensions or additions to said street railways. And also the electric railroad lines formerly owned by The Akron Bedford and Cleveland Railroad Company between the point of connection of the line of said The Akron Bedford and Cleveland Railroad Company and the street railroad formerly owned by The Akron Street Railroad Company about 150 feet northerly from the north end of the bridge over the Cuyahoga River in Front street, in the Village of Cuyahoga Falls, Summit County Ohio and its northerly terminus in the Hamlet of Newburgh, Cuyahoga County Ohio, and its branch line extending from its power house in Cuyahoga Falls to Silver Lake, in the Township of Stowe, in said County of Summit, and also all single or

double track extensions or additions to the aforesaid lines; and als
all single or double track branch lines connecting with its said mai
line.

And also the electric railroad lines formerly owned b
455 The Akron and Cuyahoga Falls Rapid Transit Compan
between Barberton and Kent, and running through Mai
and Bowery streets in the City of Akron Ohio, and also an extensio
from Kent to Ravenna in Portage County Ohio. And also all co
porate property real and personal, lands, depots, yard ground
rights of way, licenses, easements, buildings, erections, superstru
tions, power houses, car houses, depots and station buildings, wa
ing rooms, machine shops, car shops, blacksmith shops, iron an
steel rails, tracks chains, bars, ties, switches, turnouts, turn table
bridges, trestles, cars, motors, rolling stock, engines, dynamos, ge
erat*ions* and all electrical equipment and apparatus poles, wire
lamps, trolleys, and all contracts and all other property and thin
whatsoever, belonging to the grantor. And also all rights privileg
and franchises of the grantor. And also all and singular the ten
ments, hereditaments and appurtenances to the above described pre
ises, property, rights, franchises and privileges belonging or in an
wise appertaining, and the reversion and reversions, remainder an
remainders, rents, issues and profits thereof; and also all t
456 estate, right, title, interest, property, possession, claim an
demand whatsoever, as well in law as in equity, of the sa
grantor, in and to the above described premises, and every pa
& parcel thereof, with the appurtenances; it being hereby intend
to convey all the property, rights, franchises and privileges of a
sort or nature, which the grantor now owns: To have and to Ho
all and singular the above mentioned and described premises, ra
roads, plants, real and personal property, rights, franchises and pr
ileges unto the grantee its successors and assigns forever.

This deed is executed in triplicate, each of which shall be
original.

In Witness Whereof, said The Northern Ohio Traction Compan
by its Vice President and Secretary, thereunto lawfully authori
by action of its Board of Directors, and its stockholders, as here
above set forth, has hereunto set its corporate name and affixed
corporate seal, this 29″ day of December A. D. 1902.

457 THE NORTHERN OHIO TRACTION
CO.,
By WILL CHRISTY, *V. President,* AND
C. F. MOORE, *Secretary.*

[CORPORATE SEAL.]

Signed, sealed and delivered in presence of—
SAMUEL G. ROGERS.
T. W. WAKEMAN.

STATE OF OHIO,
Summit County, ss:

Personally appeared before me, a Notary Public within and for said County, in the State aforesaid, this 29" day of December 1902, Will Christy and C. F. Moore, to me known and known to me to be respectively; the Vice President and Secretary of The Northern Ohio Traction Company, the corporation which executed the foregoing instrument who acknowledged that they did sign and seal said instrument as such Vice President and Secretary respectively, for and on behalf of said corporation and that the same is their free act and deed as such Vice President and Secretary respectively, and the free and corporate act and deed of said The Northern Ohio Traction Company;

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at Akron, Ohio, the day and year last
458 aforesaid.

[SEAL.] SAMUEL G. ROGERS,
A Notary Public Within and for Summit County, Ohio.

Transferred Dec. 30, 1902.
Received Dec. 30" 1902 at 1:55 P. M.
Recorded Jan. 6th, 1903.

W. ALLING, *Recorder.*

459 Mr. Mather: Will you agree that a blanket offer may be made of all the exhibits referred to as defendant's exhibits?

Mr. Frank: I don't want to agree to a blanket offer because I don't recall all of those exhibits.

Mr. Mather: We offer in evidence Defendant's Exhibit D.

Mr. Frank: What is that?

Mr. Mather: That is the written offer referred to yesterday.

A true copy of said defendant's exhibit D is hereto next annexed and made a part hereof at pages — to — hereof both inclusive.

460 DEFENDANT'S EXHIBIT "D" AND DEFENDANT'S EXHIBIT "C."

AKRON, OHIO, January 16, 1911.

The Northern Realty Company, Akron, Ohio.

SIRS: The undersigned hereby offers and tenders you Five Thousand dollars for the property a description of which is hereto attached.

By reason of the fact that important negotiations depend upon your prompt acceptance or rejection of this proposition, we request your decision not later than Saturday noon, Jan. 21, 1911.

Very truly,

THE CUYAHOGA RIVER POWER CO.,
By WILLIS BACON, *Its Agent and Att'y.*

If not called for in person mail reply to WILLIS BACON, *Tiffin, O.*

461 AKRON, OHIO, January 16, 1911.

The Northern Realty Company, Akron, Ohio.

GENTLEMEN:—The undersigned hereby offers and tenders you Four Thousand dollars for the property a description of which is hereto attached, the same to be subject to an easement or privilege to you or your assigns of withdrawing water from the said Cuyahoga River sufficient to operate the condensors of a steam power plant of 25,000 K. W. capacity, and returning the said water to the river or pool above the dam, from which you withdraw said water.

By reason of the fact that important negotiations depend upon your acceptance or rejection of this proposition, we request your decision not later than Saturday noon, Jan. 21, 1911.

Very truly,

THE CUYAHOGA RIVER POWER COMPANY,
By WILLIS BACON,
Its Agent and Attorney.

If not called for in person mail reply to Willis Bacon, Tiffin, Ohio.

462 *Description of Property.*

Being the following described property: Situated in Summit County, Ohio, and beginning at the point of intersection of the center of the Cuyahoga river and the north and south township line between Portage Township and Cuyahoga Falls Township; thence north 0 degrees 30′ east 100 feet; thence easterly and southeasterly along the northerly bank of said Cuyahoga river 100 feet distant from the center line of said river, following the meandering of same, to a point on the line between the property of said The Northern Realty Company and the property of the A. B. & C. R. R. Company, said point being 100 feet distant from the center of the Cuyahoga river, measured at right angles with same; thence south 1 degree 20′ west along said line between the property of The Northern Realty Company and the property of the A. B. & C. R. R. Company to the southwest corner of the property of said A. B. & C. R. R. Company; thence south 88 degrees east along the south line of the property of the A. B. & C. R. R. Company, said line being the dividing line between the property of the A. B. & C. R. R. Company and the property of The Northern Realty Company, to a point 100 feet distant from the center of the Cuyahoga river, measured at right angles with same; thence southeasterly and northeasterly along the northerly bank of
463 the Cuyahoga river 100 feet distant from the center line thereof, and following the meanderings of same, to a point on a line of the land of said The Northern Realty Company, said line being an extension northerly of the east line of Tract No. 3, Portage Township, Summit County, Ohio, and also being 100 feet distant from the center of the Cuyahoga river measured at right angles with same; thence northerly along said line to a stone pipe;

thence northerly along the high bank of the Cuyahoga river and one rod westerly of same the following courses and distances; north 34 degrees 35′ east 264 feet; thence north 27 degrees 35′ east 286.44 feet; thence north 2 degrees 30′ west 116.16 feet; thence north 24 degrees 10′ west 138 feet; thence north 8 degrees 40′ east 107.6 feet; thence north 19 degrees 31′ east 108.24 feet; thence north 36 degrees 40′ east 168.3 feet; thence north 53 degrees 40′ east 454.7 feet; thence north 35 degrees east 280.7 feet to the northeast corner of the lot owned by Tom Patterson; thence northerly following along the westerly bank of said Cuyahoga river to the southeast corner of the property formerly belonging to The Falls Rivet & Machine Company; thence along the line between the land formerly belonging to The Falls Rivet Machine Company and the property of The Northern Realty Company to a point on the westerly bank of said river, where said boundary line crosses said river; thence south 75 degrees east 157 feet along the line between the property formerly
464 belonging to The Falls Rivet & Machine Company and the lands of said The Northern Realty Company to a point on the top of the bank on the easterly side of said Cuyahoga river; thence south 23 degrees west 118.80 feet along the top of said east bank; thence south 63 degrees east 52 feet to the west line of Water street where an iron grate bar is set; thence south 22 degrees 30′ west 660 feet along the west line of Water street to an iron pin; thence south 17 degrees 30′ west 663.34 feet along the west side of Water street to an iron pin; thence north 63 degrees 37′ west 128.4 feet along north line of land formerly belonging to C. S. Sill to an iron pipe; thence south 31 degrees 30′ west 317.46 feet along the west line of same land to an iron pipe; thence south 41 degrees 30′ west 341.88 feet along the west line of said Sill's land to an iron pin; thence southerly and westerly along the southerly bank of said Cuyahoga river and approximately 100 feet distant from the center of said river, following the meanderings of same to a point on the north and south township line between Portage Township and Cuyahoga Falls Township; thence north 0 degrees 30′ east along said township line 100 feet to the place of beginning. Contains 40 acres more or less, with all the privileges, easements, rights, and appurtenances thereunto belonging.

Also the following described real estate, to wit: Situated in
465 Summit County, Ohio, and beginning at an iron pin at the southwest corner of said the A. B. & C. R. R. Company's land, said pin being on an island in the Cuyahoga river; thence north 1 degree 20′ east along said Railroad Company's west line to a point 100 feet distant from the center of the Cuyahoga river, measured at right angles with same; thence southeasterly to the south line of said Railroad Company's property at a point 100 feet distant from the center of the Cuyahoga river, measured at right angles with same; thence along the south line of said Railroad Company's land to the place of beginning. Contains 0.3 acres more or less, with all the privileges, easements, rights and appurtenances thereunto belonging, all of the above property being in the Township of Cuyahoga Falls.

466 Mr. Mather: We offer in evidence defendant's exhibit E. That is the consolidation agreement between The Akron Traction and Electric Company and The Akron Bedford and Cleveland Railroad Company.

Mr. Frank: We object to that.

The Court: Objection overruled. It may be admitted.

Plaintiff excepts.

A true copy of said defendant's exhibit E is hereto next annexed and made a part hereof at pages — to — hereof both inclusive.

467 DEFENDANT'S EXHIBIT E.

Agreement entered into this 26th day of May, 1899, by and between The Akron Traction and Electric Company, a corporation of the State of Ohio, and its directors, party of the first part, and The Akron, Bedford and Cleveland Railroad Company, a corporation of the State of Ohio, and its directors, party of the second part, each of said companies acting through and by unanimous action and concurrence of their respective Boards of Directors. Witnesseth: That—

Whereas, the laws of the State of Ohio provide that whenever the lines or authorized lines of any street railroad corporations or companies meet or intersect, or whenever any such line of any street railroad corporation or company, and that of any inclined plane railway or railroad company or corporation, or any railroad operated by electricity or other means of rapid transit may be conveniently connected to be operated to mutual advantage, such corporations or companies, or any two or more or them, are authorized to consolidate themselves into a single corporation; and

468 Whereas, The Akron Traction and Electric Company is a street railroad corporation or company, whose lines meet and intersect, and may be conveniently connected with the lines of The Akron, Bedford and Cleveland Railroad Company, which is a railroad operated by electricity, in such manner that the lines of the two companies aforesaid may be operated to mutual advantage: and,

Whereas, for the greater convenience of the public, and for the mutual advantage and benefit of the stockholders of each of said companies, the directors of said companies have proposed by and with the assent, approval and ratification of the stockholders of each of said companies to be had in due form of law at meetings to be regularly called and held for that purpose to unite and consolidate the capital stock, property, rights, privileges and franchises of the said companies into one corporation.

Now, therefore, the parties hereto, in accordance with the provisions of the statutes in such cases made and provided, the said railroad companies acting under and in pursuance of the

469 resolutions of their respective Boards of Directors, and upon the assent and ratification of the stockholders of said companies to be had and made, as hereinbefore set forth, do hereby agree to and with each other to, and do, hereby unite and consolidate their

apital stock, roads, property, rights, privileges and franchises into
ne company upon the following terms and conditions, to-wit:
1. The name of said consolidated company shall be and is The
orthern Ohio Traction Company.
2. The officers of said company shall consist of a President, Vice-
resident, Secretary and Treasurer, and such other officers as the
oard of Directors of said company may, from time to time, pre-
ribe.
3. The number of directors of said company shall be seven (7),
nd the names and places of residence of the directors of said com-
any who are to hold office until their successors are elected by the
ockholders at the meeting appointed by the stockholders called to
take this agrement into consideration, pursuant to Section
70 3383 of the Revised Statutes, which meeting to elect such
successors is hereby fixed for the 5th day of August, at three
clock P. M., at the office of The Northern Ohio Traction Com-
any, in the City of Akron, Ohio, are as follows:
Henry A. Everett, Willoughby, Ohio.
Charles W. Wason, Cleveland, Ohio.
Edward W. Moore, Cleveland, Ohio.
Will Christy, Akron, Ohio.
Joseph R. Nutt, Akron, Ohio.
Baruch Mahler, Cleveland, Ohio.
Louis E. Beilstein, Cleveland, Ohio.
4. The names and the residences of the officers of the company
ho shall remain in office until their successors are elected by the
oard of Directors to be elected at the meeting of the stockholders
ppointed, as mentioned in the last paragraph of this agreement, and
ntil their successors so elected are qualified, are as follows:
President Henry A. Everett, Cleveland, Ohio.
Vice-President Will Christy, Akron, Ohio.
71 Secretary Charles F. Moore, Akron, Ohio.
Treasurer Joseph R. Nutt, Akron, Ohio.
5. The principal office of the company shall be in the city of
kron, County of Summit, and State of Ohio.
6. The capital stock of said company shall be Three Million Dol-
rs ($3,000,000.00), divided into Thirty Thousand (30,000) shares
f the par value of One Hundred Dollars ($100.00) each.
One Million Dollars ($1,000,000.00) of said capital stock shall be
referred stock, which shall be entitled to a five (5) per cent cumu-
tive annual dividend, payable semi-annually, on the first days of
pril and October in each year.
The five (5) per cent cumulative annual dividend hereinbefore
rovided for the Preferred Stock shall be all the dividends to which
ne Preferred Stock shall ever become entitled.
In the event of the liquidation or dissolution of the corporation,
ne surplus assets and funds thereof shall be applied in the first place,
in distributing to the holders of the Preferred Stock the full
72 amount of the par value thereof and the accrued dividends,
if any, charged, before any amount shall be paid upon the
ommon stock, and after such distribution in full to the holders of

said Preferred stock, the surplus assets and funds shall belong and be divided among the holders of the Common stock to the e clusion of the holders of the Preferred stock.

Two Million Dollars ($2,000,000.00) of said capital stock shall Common stock, which shall not be entitled to receive dividends any one semi-annual period until after the payment to the holde of the Preferred stock of the dividends hereinbefore provided to paid to them for such period, and for all preceding periods.

Both Preferred and Common stock shall be entitled to the sam voting power.

7. All of said shares of said capital stock shall be distributed follows:

To said The Akron Traction and Electric Company, party of t first part, and its stockholders, One Million Five Hundred Tho sand Dollars ($1,500,000.00) of fully paid Common stoc

473 To the Akron, Bedford and Cleveland Railroad Compan and its stockholders, Five Hundred Thousand Dollars ($50 000.00) in par value of the Common stock, and Five Hundred Tho sand Dollars ($500,000.00) in Preferred stock, all of the stock afo said being issued as fully paid, and in part consideration for t transfer to the consolidated company of the properties of the co stituent companies hereinbefore referred to.

8. The Board of Directors of the consolidated, The Northern Oh Traction Company, are hereby authorized, directed and empower to issue its interest bearing twenty (20) year coupon bonds, in t amount of Three Million Dollars ($3,000,000.), said bonds to dated July 1st, 1899, to be of the denomination of One Thousa Dollars ($1,000.00) each, and to bear interest at the rate of Fi (5) per cent per annum, payable semi-annually, on the first days January and July of each year, at The Dime Savings and Banki Company, Cleveland, Ohio, or Central Trust Company in the City New York; and said Board of Directors is also authorized and

474 rected, for and on behalf of the company, in order to secu the payment of such bonds, when issued, to provide for t execution, acknowledgement, and delivery, for and on beha of the company, by its proper officers, of a deed of trust or mortga conveying and pledging all of the rights, property, franchises, pri leges, choses in action, and assets of the company, to secure the pa ment thereof. Of the bonds so issued the consolidated, The Northe Ohio Traction Company, shall, in addition to the stock to be issu and exchanged as aforesaid, and as a further consideration for t properties of the constituent companies, issue to the stockholders The Akron Traction and Electric Company One Million Five Hu dred Thousand Dollars ($1,500,000.00) in par value of its go bonds aforesaid, and to The Dime Savings and Banking Compa of Cleveland, Ohio, One Million Dollars ($1,000,000.00) in par val of said bonds, to be held by said The Dime Savings and Banki Company as security for the payment, and to be applied to the pa ment of a mortgage indebtedness of One Million Dollars ($1,00 000.00) now outstanding upon the property and franchises of T Akron, Bedford and Cleveland Railroad Company to The Dime Sa

ings and Banking Company, Trustee, and said The Dime
475 Savings and Banking Company is hereby authorized, empowered and directed at any time, and from time to time, to exchange said bonds, or any number thereof, for an equal number of said mortgage bonds of The Akron, Bedford and Cleveland Railroad Company, and shall thereupon cause to be cancelled the first mortgage bonds so received by it in exchange. Said The Dime Savings and Banking Company shall further have authority and power at any time, and from time to time, to sell said bonds, or any number thereof, upon the demand of the consolidated company when the same can be sold at such a price that with the net proceeds arising therefrom an equal number of said The Akron, Bedford and Cleveland Company's bonds can be purchased in the market, and to apply the proceeds of the sale thereof in the purchase of an equal number of said first mortgage bonds, which it shall likewise cause to be cancelled. At the maturity of said The Akron, Bedford and Cleveland Railroad Company's bonds the said The Dime Savings and Banking Company shall sell all of said One Thousand (1,000) bonds then remaining in its possession, and apply the proceeds thereof to the redemption or payment of said The Akron, Bedford and Cleveland Railroad Company's bonds then outstanding, provided
that the said The Dime Savings and Banking Company
476 shall not sell the bonds so remaining in its possession at less than par, unless upon demand of the consolidated company, and the deposit by it with said The Dime Savings and Banking Company of the difference between the price at which it so directs said bonds to be sold, and their par value. The money so deposited by said consolidated company shall be used in connection with the proceeds realized from the sale of said bonds of the consolidated company in the redemption of said The Akron, Bedford and Cleveland Railroad Company's bonds. The remaining Five Hundred Thousand Dollars ($500,000.00) in par value of said bonds shall be held by the consolidated company, and disposed of by it for the betterment of its properties, the purchase of other properties, or the raising of funds therefor, in such manner, and under such limitations as may be prescribed by the said consolidated company in the mortgage or deed of trust issued to secure the same.

9. At the time of the consolidation of the two constituent companies, The Akron Traction and Electric Company shall have in its
treasury Two Hundred and Eighty-five Thousand Dollars
477 ($285,000.00) in cash, which shall become the property of the concolidated company.

10. Upon the issuance and delivery of the securities hereinbefore provided for, the stock of the constituent companies shall be surrendered to the consolidated company.

11. The consolidated company hereby assumes and agrees to pay all indebtedness of the constituent companies existing at the date hereof, and likewise to assume and pay off all liabilities against each and all of the said constituent companies for injuries heretofore committed by them. Each constituent company is to account for and pay to the consolidated company all receipts and income received from the date of this agreement. The consolidated company hereby as-

sumes and agrees to pay the present outstanding mortgage indebtedness of One Million Dollars ($1,000,000.00) upon the property of The Akron, Bedford and Cleveland Railroad Company, but does not, however, assume the present outstanding obligation of The Akron Traction and Electric Company to W. E. Finley, and assigned by him to H. A. Everett, but in consideration of the issuance of
478 the securities, hereinbefore provided, to the stockholders of The Akron Traction and Electric Company, said stockholders of The Akron Traction and Electric Company shall assume said obligation and procure the cancellation thereof.

The assumptions of indebtedness provided for in this paragraph shall be upon the part of the consolidated company only and shall not in any manner be interpreted as liabilities of its stockholders; it being intended that the consolidated company shall assume said indebtedness only in so far as it may lawfully do so without imposing a liability upon its stockholders.

12. All the affairs, property and business of the said consolidated company shall be under the control of the Board of Directors of the company, who shall have full power in the management and control of its business, subject to the laws of the State of Ohio.

13. The said The Akron Traction and Electric Company and the said The Akron, Bedford and Cleveland Railroad Company hereby respectfully grant, convey, transfer, and set over to the consolidated The Northern Ohio Traction Company, all of their respective
479 rights, franchises, moneys, claims, choses in action, and property of any sort or nature whatsoever, it being especially understood and agreed that when this consolidation agreement has been ratified by the stockholders of each of said companies in accordance with law, this agreement shall constitute a conveyance to the consolidated company, the said The Northern Ohio Traction Company, of all the rights, property, privileges, books, papers, moneys, claims, choses in action, and assets, of every description whatsoever, of the three constituent companies signing this agreement.

In witness whereof, each of the above named constituent companies, and the directors of said companies as well, parties hereto, have caused these presents to be signed by said directors, and by the President and Secretary of each of said companies and have caused the respective corporate seals of said companies to be affixed the day and year first above written.

THE AKRON TRACTION AND ELECTRIC COMPANY,
By HENRY A. EVERETT, *President.*
CHARLES F. MOORE, *Secretary.*

[CORPORATE SEAL.]

480 HENRY A. EVERETT,
WILL CHRISTY,
EDWARD W. MOORE,
LOUIS E. BEILSTEIN,
WM. B. SANDERS,
Directors of the Akron Traction and Electric Company.

THE AKRON, BEDFORD & CLEVELAND
RAILROAD CO.,
By HENRY A. EVERETT, *President.*
FRED S. BORTON, *Secretary.*

[CORPORATE SEAL.]

HENRY A. EVERETT.
ISAAC N. TOPLIFF.
WILL CHRISTY.
EDWARD F. MOORE.
CHAS. W. WASON.
Directors of The Akron, Bedford & Cleveland Railroad Company.

1 STATE OF OHIO,
Cuyahoga County, ss:

Personally appeared before me, a Notary Public in and for said
unty and state, the above named Henry A. Everett, President, and
arles F. Moore, Secretary, of The Akron Traction & Electric Com-
ny, and acknowledged that they did sign and seal the foregoing
strument, and that the same is their free act and deed, and the free
d corporate act and deed of The Akron Traction & Electric Com-
ny.
In witness whereof, I have hereunto set my hand and seal at Cleve-
nd, Ohio, this 26th day of May, 1899.
[SEAL.] G. E. BENDER,
Notary Public.

ATE OF OHIO,
Cuyahoga County, ss:

Personally appeared before me, a Notary Public in and for said
unty and state, Henry A. Everett, President, and Fred S. Borton,
Secretary of The Akron, Bedford & Cleveland Railroad Com-
2 pany, who acknowledged that they did sign and seal the fore-
going instrument, and that the same is their free act and deed,
d the free and corporate act and deed of The Akron, Bedford &
eveland Railroad Company.
In witness whereof, I have hereunto set my hand and seal at
eveland, Ohio, this 26th day of May, 1899.
[SEAL.] G. E. BENDER,
Notary Public.

33 I, Charles F. Moore, Secretary of The Akron Traction and
Electric Company, do hereby certify that the Agreement of
onsolidation hereto attached, was submitted to the stockholders of
he Akron Traction & Electric Company, at a meeting thereof, called
parately, for the purpose of taking the same into consideration; due
otice of the time and place of holding such meeting, and the object
ereof, had been given by written or printed notices, addressed to

each of the persons in whose name the capital stock of the company stands on the books thereof, and also by a like notice published in The Akron Democrat, a newspaper in the City of Akron, where such company has its principal office and place of business.

I further certify that at such meeting of the stockholders the agreement of the Directors was considered, and a vote by ballot taken for the adoption or rejection thereof, each share of stock upon which had been paid all the installments called for by the Board of Directors entitling the holder thereof to one vote; the ballots were cast in
484 person or by proxy, and four votes representing nine hundred and ninety-seven shares of stock, being more than two-thirds of all the votes cast at the meeting, were in favor of the adoption of the agreement.

In witness whereof, I have set my hand and seal this Fifth day of July, A. D. 1899.

[CORPORATE SEAL.] C. F. MOORE, *Secretary.*

10¢ I. R. Stamp cancelled.

485 & 486 I, Fred S. Borton, Secretary of The Akron, Bedford and Cleveland Railroad Company, do hereby certify that the agreement of consolidation hereto attached was submitted to the stockholders of The Akron, Bedford and Cleveland Railroad Company at a meeting thereof called separately for the purpose of taking the same into consideration; due notice of the time and place of holding such meeting, and the object thereof had been given by written or printed notices addressed to each of the persons in whose names the capital stock of the company stands on the books thereof, and also by a like notice published in the Cleveland Leader, a newspaper in the City of Cleveland, where such company has its principal office and place of business.

I further certify that at such meeting of stockholders the agreement of the directors was considered, and a vote by ballot was taken for the adoption or rejection thereof, each share of stock upon which had been paid all the installments called for by the Board of Directors entitling the holder thereof to one vote; the ballots were cast in person or by proxy, and eight votes, representing 9012
487 shares of stock, being more than two-thirds of all the votes cast at the meeting, were in favor of the adoption of the agreement.

In Witness Whereof, I have set my hand and seal this 3d day of July, 1899.

[CORPORATE SEAL.] FRED S. BORTON, *Secretary.*

10¢ I. R. Stamp cancelled.

487½ UNITED STATES OF AMERICA,
State of Ohio:

Office of the Secretary of State.

I, Charles Kinney, Secretary of State of the State of Ohio, do hereby certify that the annexed instrument is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation of "The Northern Ohio Traction Company" filed in this office on the 12th day of July, A. D., 1899, and recorded in Volume 78, Page 113, of the Records of Incorporations.

Witness My Hand and Official Seal, at Columbus, this 12th day of July, A. D. 1899.

[SEAL.]

CHARLES KINNEY,
Secretary of State.

488 Mr. Mather: We offer in evidence Defendant's Exhibit J. Said Defendant's exhibit J is a blue print, hereto annexed and made a part hereof at page — hereof.

Mr. Frank: On Defendant's exhibit D. I object to the introduction of the letter of January 16th, the second letter that is attached to that. That is the second offer. The final disagreement was on the other offer.

The Court: It may be admitted.

Plaintiff excepts.

For copy of said defendant's exhibit D see pages — to — hereof both inclusive.

Mr. Mather: We now offer in evidence defendant's exhibit Q.

Mr. Frank: We object to that.

The Court: It may be admitted so much of it as pertains to this case.

Plaintiff excepts.

A true copy of said defendant's exhibit Q as admitted by the court is hereto annexed and made a part hereof, see page — hereof.

489 Mr. Mather: We now offer in evidence defendant's exhibits R, O, and P.

Mr. Frank: We object.

The Court: They may be admitted in so far as they pertain to this case.

True copies of said defendant's exhibits R, O and P, are hereto annexed and made a part hereof, as admitted by the court, at pages —, —, and —, hereof respectively.

490 Mr. Mather: We now offer in evidence Defendant's exhibit B and Defendant's exhibit Y.

True copies of said defendant's exhibit B are hereto attached and made a part hereof as defendant's exhibit B-1, B-2, and B-3, at pages — to — hereof both inclusive.

True copies of said defendant's exhibit Y are hereto next attached and made a part hereof see pages — to — hereof inclusive.

491 DEFENDANT'S EXHIBIT Y.

These Articles of Incorporation of The Northern Realty Company

Witnesseth, That we, the undersigned, all of whom are citizens of the State of Ohio, desiring to form a corporation, for profit under the general corporation laws of said State, do hereby certify:

First. The name of said corporation shall be The Northern Realty Company.

Second. Said corporation is to be located at Akron, in Summit County, Ohio, and its principal business there transacted.

Third. Said corporation is formed for the purpose of buying selling, exchanging and generally dealing in real properties, improved and unimproved, office building, store buildings, dwelling houses farms, lots, wharves, water rights and privileges; building, construcing, operating, maintaining, leasing and selling dwelling houses apartment houses and business blocks and other real property of all kinds and description; maintaining a general real estate agency and doing all things incident to a general real estate business.

In furtherance and not in limitation of the foregoing objects, but as a part of the objects of this corporation, said company shall have power;

(*a*) To acquire the real property, in whole or in part, of any person, firm or company, and to pay therefor in cash, or stocks bonds debentures or notes of this corporation or otherwise, and to assume the liabilities thereof.

(*b*) Issue bonds, debentures or obligations of the corporation secure the payment by mortgage, pledge, deed of trust, or otherwise and dispose of and market the same.

The foregoing clauses shall be construed both as objects
492 and as powers, but no recitation or declaration of specific special objects or powers herein enumerated shall be deemed to be exclusive; but it is hereby expressly declared that all other powers not inconsistent therewith, now or hereafter permitted granted under the laws of Ohio, are hereby expressly included.

Fourth. The Capital stock of said corporation shall be Ten Thousand Dollars, ($10,000.00) divided into one hundred (100) shares of One Hunded Dollars, ($100.00) each,

In witness whereof, we have hereunto set our hands, this 12 day of October, A. D. 1909.

WILL CHRISTY.
CHARLES H. HOWLAND
CHAS. H. LAHR.
C. F. MOORE.
R. L. JOHNSTON.

493 THE STATE OF OHIO,
County of Summit, ss:

Personally appeared before me, the undersigned, a Notary Public in and for said County, this 12th. day of October, A. D. 1909, the above named Will Christy, Charles H. Howland, Charles H. Lahr, C. F. Moore and R. L. Johnston, who each severally acknowledged the signing of the foregoing articles of incorporation to be his free act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year last aforesaid.

[SEAL.] N. O. MATHER,
Notary Public.

THE STATE OF OHIO,
County of Summit, ss:

I, C. D. Crumb, Clerk of the Court of Common Pleas, within and for the county aforesaid, do hereby certify that N. O. Mather, whose name is subscribed to the foregoing acknowledgment as a Notary Public, was at the date thereof a Notary Public in and for said county, duly commissioned and qualified, and authorized as such to take said acknowledgment, and further that I am well acquainted with his handwriting and believe that the signature to said acknowledgment is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Akron, Ohio, this 12 day of October A. D. 1909.

[SEAL.] C. D. CRUMB, *Clerk.*

494 UNITED STATES OF AMERICA,
State of Ohio:

Office of the Secretary of State.

I, Carmi A. Thompson, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation of "The Northern Realty Company," filed in this office on the 5 day of Nov. A. D. 1909 and recorded in Volume 123—Page 426—of the Records of Incorporations.

Witness my hand and official seal at Columbus, Ohio, this 5th day of November, A. D. 1909.

[SEAL.] CARMI A. THOMPSON,
Secretary of State.

Filed Feb 4- 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

495 Mr. Mather: We now offer in evidence defendant's exhibits T-1 to T-15 inclusive.

True copies of said defendant's exhibit- T-1 to T-15 inclusive, as testified to by the witness Lahr, are hereto next annexed and made a part hereof on pages 439 to 453 hereof inclusive respectively.

496 DEFENDANT'S EX. T-1.

The Northern Ohio Traction & Light Company to L. E. Beilstein, Dr.

1910. Toledo, Ohio.

As per Invoices or Statement Attached.

Attached Invoice..... 20.00

TOLEDO, OHIO, March 23, 1910.

The Northern Ohio Traction & Light Company to L. E. Beilstein, Dr.

Expenses attending meeting of Special Power Committee, March 2nd and 11th, 1910..... $20.00

New Central Power Station.

O. K.
BAUSCH.

Received M'ch 26, 1910, of The Northern Ohio Traction & Light Co. Twenty and 00/100 Dollars, in full of the above account.
$20.00. L. E. BEILSTEIN.

Please Date, Receipt and Return Voucher Immediately.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

Form 5—5M—8-19-13—41637

No. 7616 $ 20.00

L. E. Beilstein.

Toledo. O

For Expenses

Month of March 1910

The Northern Ohio Traction and Light Company

MISCELLANEOUS

Expense Account		
Material on Hand, Cuyahoga Falls		
" " " Canton		
Electrical Supplies		
ROAD		20.00
#124 New Central		
Power Station	20.00	

Defendant's Ex. T-1.

1	Supt. Ways and S.			Brought	
2	Ballast		54	Mis. p'rp't sup. & ex.	
3	Ties		55	Sub st'n sup. and exp.	
4	Rails		56	Power purchased	
5	Rail F'st'ng & Joints		57	Power exch'n'd Bal.	
6	Specia Work		58	Other operations, Dr.	
7	Underground con't'n		59	Other operations, Cr.	
8	R. and T. Labor		60	Pass. con., mot., tr'm	
9	Paving		61	Ft. & ex. " " "	
10	Misc. R. & T. exp		62	Mis. car service emp.	
11	Cleaning & Sanding		63	Mis. car service exp.	
12	Remov, mow, ice, s'd		64	Station employees	
13	Tunnels		65	Station expenses	
15	Bridg., trss. & culv.		66	Carhouse employees	
16	Cross'gs, fence, signs		67	Carhouse expenses	
17	Signal & in'rl'k'gsys		68	Op. sig'l int'rl'k'g sys	
18	Tel. & telg. systems		69	Op. tel. & telg. sys.	
19	Other mis. way exp.		70	Ex. frt. coll'ns & deliv.	
20	Poles and fixtures		71	Loss and damage	
21	Underg'd conduits		72	Other transp'n exp.	
22	Transmission system		73	Sal. & ex. gen. of'rs.	
23	Distribution system		74	Sal. ex. gen. of cks.	
24	Misc. electric line exp.		75	Gen. of Sup. & ex	
25	Buildings & structures		76	Law expenses	
26	Dep'c'n way & str's.		77	Relief Dept. exp.	
27	Other operations, Dr.		78	Pensions	
28	Other operations, Cr.		79	Mis. general exp.	
29	Super. of equipment		80	Other operations, Dr.	
30	Power plant equip't		81	Other operations, Cr.	
31	Substation equipment		82	Injuries and damages	

Brought.....

TRANSMISSION

209 Sub station wages.....
210 Maint. trans. lines.....
211 Sub station sup. & exp.....
212 Maintaining sub station buildings.....
213 " " " equipment.....

STORAGE BATTERY

214 Wages.....
215 Supplies.....
216 Battery repairs.....
217 " accessories.....

DISTRIBUTION

218 Wages.....
219 Supplies and expenses.....
220 Set'g and rem. meters and transformers.....
221 Underground conduits.....
222 Overhead dis. lines.....
223 Underground dis. lines.....
224 Services.....
225 Transformers.....
226 Meters.....

UTILIZATION

227 Commercial arc installation.....
228 Inspection customers' premises.....
229 Municipal arc installation.....
230 " incandescent installation.....
231 Commercial arc repairs.....
232 " incandescent renewals.....

25 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Ravenna.....
" Barberton.....
" A.....
" B.....
" Beach City.....
" Canton.....
" High St.....
" Midvale.....
" Macedonia.....
" Gorge.....
" Kenmore Barn.....
30 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
31 Ravenna.....
" Bedford.....
" Barberton.....
" A.....
" B.....
" Canton.....
" Massillon.....

Brought.....
" Kenmore Barn.....
51 Akron.....
" Cuyahoga Falls.....
51 Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
52 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Midvale.....
" Canton.....
" Gorge.....
53 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
54 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
55 Ravenna.....

Form 5—531—8-19-13—41637

No. 79 7 7 $ 107.63

C. R. Chandler, Cashier,

City.

For Freight & Drayage,

Month of April 1910.

The Northern Ohio Traction and Light Company

MISCELLANEOUS

Expense Account			
Material on Hand, Cuyahoga Falls			
" " " Canton			
Electrical Supplies			
#124 New Central Power Station	.85		

RAILWAY

1 Supt. Ways and S.			
2 Ballast			
3 Ties			
4 Rails			
5 Rail F'st'ng & Joints			
6 Specia Work			
7 Underground con'l'n			
8 R. and T. Labor			
9 Paving			
10 Misc. R. & T. exp.			
11 Cleaning & Sanding			
12 Remov. snow, ice, s'd			
13 Tunnels			
15 Bridg., tres, & culv.			
16 Cross'gs, fence, signs			
17 Signal & in'rl'k'gsys			
18 Tel. & telg. systems			
19 Other mis. way exp.			
20 Poles and fixtures			
21 Underg'd conduits			
22 Transmission system			
23 Distribution system			
24 Misc. electric line exp.			
25 Buildings & structures			
26 Dep'c'n way & str's			
27 Other operations, Dr.			
28 Other operations, Cr.			
29 Super. of equipment			
30 Power plant equip't			
31 Substation equipment			
Brought			
54 Mis. p'rp't sup. & ex.			
55 Sub st'n sup. and exp.			
56 Power purchased			
57 Power exch'n'd Bal.			
58 Other operations, Dr.			
59 Other operations, Cr.			
60 Pass. con., mot., tr'm			
61 Ft. & ex. " " "			
62 Mis. car service emp.			
63 Mis. car service exp.			
64 Station employees			
65 Station expenses			
66 Carhouse employees			
67 Carhouse expenses			
68 Op. sig'l int'rl'k'g sys			
69 Op. tel. & telg. sys.			
70 Ex. frt. coll'ns & deliv.			
71 Loss and damage			
72 Other transp'n exp.			
73 Sal. & ex. gen. of'rs.			
74 Sal. ex. gen. of cks.			
75 Gen. of Sup. & ex			
76 Law expenses			
77 Relief Dept. exp.			
78 Pensions			
79 Mis. general exp.			
80 Other operations, Dr.			
81 Other operations, Cr.			
82 Injuries and damages			

Brought.....

TRANSMISSION

209 Sub station wages.....
210 Maint. trans. lines.....
211 Sub station sup. & exp.....
212 Maintaining sub station buildings.....
213 " " " equipment.....

STORAGE BATTERY

214 Wages.....
215 Supplies.....
216 Battery repairs.....
217 " accessories.....

DISTRIBUTION

218 Wages.....
219 Supplies and expenses.....
220 Set'g and rem. meters and transformers.....
221 Underground conduits.....
222 Overhead dis. lines.....
223 Underground dis. lines.....
224 Services.....
225 Transformers.....
226 Meters.....

UTILIZATION

227 Commercial arc installation.....
228 Inspection customers' premises.....
229 Municipal arc installation.....
230 " incandescent installation.....
231 Commercial arc repairs.....
232 " incandescent renewals.....

25 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Ravenna.....
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" Midvale.....
" Macedonia.....
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" Canton.....
" Midvale.....
" Gorge.....
31 Ravenna.....
" Bedford.....
" Barberton.....
" A.....
" B.....
" Canton.....
" Massillon.....
" Beach City.....

Brought.....
" Kenmore Barn.....
51 Akron.....
" Cuyahoga Falls.....
51 Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
52 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Midvale.....
" Canton.....
" Gorge.....
53 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
54 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
55 Ravenna.....
" Bedford.....

497 DEFENDANT'S EX. T-2.

Apr. 15, 1910.

M. Northern O. T. Co. to Adams Express Company, Dr.

For transportation of B. 22 from Ch'go, Ill..... $.85

Charges advanced.
Val. 500.00.

SARGENT & LUNDY.

New Power Plant.

Received Payment for the Company.

O. K. W. B. MAY.

#124 New Central Power Sta.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

498 DEFENDANT'S EX. T-3.

The Northern Ohio Traction & Light Company to Sargent & Lundy, Dr.

1910.

As per Invoices or Statement Attached.

May 20, Invoice..... 750.00

To Sargent & Lundy, Dr., Engineers.

CHICAGO, 20th May, 1910.

Northern Ohio Traction & Lt. Co., Akron, Ohio.

Engineering Services in connection with Preliminary Report, as per our letter March 3, 1910, and Mr. Mahler's reply March 17, 1910..... 750

Goods received —.
Charge #124 New Central Power Sta.
Correct: C. F. M.
Correct: C. C.
Approved by
B. MAHLER

Received July 5th, 1910, [illegible]
Company Seven Hundred Fifty and
above account.

SARG[illegible]
By M. C. GIN[illegible]

$750.00.

Please Date, Receipt and Return Voucher Immediately.

The Northern Ohio Traction & Light Company

Pay to order of Sargent & [illegible]
no/100 Dollars.
To The Central Savings & Trust Co., Akron
8590.

THE NORTHERN OHIO
LIGHT CO.
J. R. NUTT, *Treasurer.*

Countersigned:
WILL CHRISTY, *President.*

[Endorsed:] Pay to the order of Corn Exchange National Bank. Sargent & Lundy.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

Form S— 3M—8-19-13—41535

No. 8590 $ 750.00

Sargent & Lundy.

Chicago, Ill.

For Engineering Services

Month of May 1910.

The Northern Ohio Traction and Light Company

MISCELLANEOUS

Expense Account			
Material on Hand, Cuyahoga Falls			
" " " Canton			
Electrical Supplies			
ROAD.		750.00	
#124 New Central Power Station 750.00			

RAILWAY

1	Supt. Ways and S.			54	Sup., p'p't sup. & ex		
2	Ballast			55	Sub st'n sup. and exp.		
3	Ties			56	Power purchased		
4	Rails			57	Power exch'n'd Bal.		
5	Rail F'st'ng & Joints			58	Other operations, Dr.		
6	Specia Work			59	Other operations, Cr.		
7	Underground con't'n			60	Pass. con., mot., tr'm		
8	R. and T. Labor			61	Ft. & ex. " " "		
9	Paving			62	Mis. car service emp.		
10	Misc. R. & T. exp.			63	Mis. car service exp.		
11	Cleaning & Sanding			64	Station employees		
12	Remov, mow, ice, s'd			65	Station expenses		
13	Tunnels			66	Carhouse employees		
15	Bridg., tres, & culv.			67	Carhouse expenses		
16	Cross'gs, fence, signs			68	Op. sig'l int'rl'k'g sys		
17	Signal & in'rl'k'gsys			69	Op. tel. & telg. sys.		
18	Tel. & telg. systems			70	Ex. frt. coll'ns & deliv.		
19	Other mis. way exp.			71	Loss and damage		
20	Poles and fixtures			72	Other transp'n exp.		
21	Undergr'd conduits			73	Sal. & ex. gen. of'rs.		
22	Transmission system			74	Sal. ex. gen. of cks.		
23	Distribution system			75	Gen. of Sup. & ex		
24	Misc. electric line exp.			76	Law expenses		
25	Buildings & structures			77	Relief Dept. exp		
26	Dep'c'n way & str's			78	Pensions		
27	Other operations, Dr.			79	Mis. general exp.		
28	Other operations, Cr.			80	Other operations, Dr.		
29	Super. of equipment						

Brought.....

TRANSMISSION

209 Sub station wages.....
210 Maint. trans. lines.....
211 Sub station sup. & exp.....
212 Maintaining sub station buildings.....
213 " " " equipment.....

STORAGE BATTERY

214 Wages.....
215 Supplies.....
216 Battery repairs.....
217 " accessories.....

DISTRIBUTION

218 Wages.....
219 Supplies and expenses.....
220 Set'g and rem. meters and transformers.....
221 Underground conduits.....
222 Overhead dis. lines.....
223 Underground dis. lines.....
224 Services.....
225 Transformers.....
226 Meters.....

UTILIZATION

227 Commercial arc installation.....
228 Inspection customers' premises.....
229 Municipal arc installation.....
230 " incandescent installation.....
231 Commercial arc repairs.....
232 " incandescent renewals.....

25 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Ravenna.....
" Barberton.....
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" Beach City.....
" Canton.....
" High St.....
" Midvale.....
" Macedonia.....
" Gorge.....
" Kenmore Barn.....
30 Akron.....
" Cuyahoga Falls.....
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" Massillon.....

Brought.....
" Kenmore Barn.....
51 Akron.....
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51 Bedford.....
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" Gorge.....
54 Akron.....
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" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
55 Ravenna.....

Form 5—5M—8-19-13—41637

No. 9346 $ 50.00

L. E. Beilstein.

Toledo. O.

For Expenses

Month of August. 1910.

The Northern Ohio Traction and Light Company

MISCELLANEOUS

Expense Account			
Material on Hand, Cuyahoga Falls			
" " " Canton			
Electrical Supplies			
ROAD.		50.00	
#124 New Central Power Station	50.00		

RAILWAY

1	Supt. Ways and S.				Brought		
2	Ballast			54	Mis. p'rp't sup. & ex.		
3	Ties			55	Sub st'n sup. and exp.		
4	Rails			56	Power purchased		
5	Rail F'st'ng & Joints			57	Power exch'n'd Bal.		
6	Specia Work			58	Other operations, Dr.		
7	Underground con't'n			59	Other operations, Cr.		
8	R. and T. Labor			60	Pass. con., mot., tr'm		
9	Paving			61	Ft. & ex. " " "		
10	Misc. R. & T. exp.			62	Mis. car service emp.		
11	Cleaning & Sanding			63	Mis. car service exp.		
12	Remov, snow, ice, s'd			64	Station employees		
13	Tunnels			65	Station expenses		
15	Bridg., tres, & culv.			66	Carhouse employees		
16	Cross'gs, fence, signs			67	Carhouse expenses		
17	Signal & in'tl'k'gsys			68	Op. sig'l int'tl'k'g sys		
18	Tel. & telg. systems			69	Op. tel. & telg. sys.		
19	Other mis. way exp.			70	Ex. frt. coll'ns & deliv.		
20	Poles and fixtures			71	Loss and damage		
21	Underg'd conduits			72	Other transp'n exp.		
22	Transmission system			73	Sal. & ex. gen. of'rs.		
23	Distribution system			74	Sal. ex. gen. of clks.		
24	Misc. electric line exp.			75	Gen. of Sup. & ex		
25	Buildings & structures			76	Law expenses		
26	Dep'c'n way & str's.			77	Relief Dept. exp.		
27	Other operations, Dr.			78	Pensions		
28	Other operations, Cr.			79	Mis. general exp.		
29	Super. of equipment			80	Other operations, Dr.		

Brought.....

TRANSMISSION

209 Sub station wages.....
210 Maint. trans. lines.....
211 Sub station sup. & exp.....
212 Maintaining sub station buildings.....
213 " " " equipment.....

STORAGE BATTERY

214 Wages.....
215 Supplies.....
216 Battery repairs.....
217 " accessories.....

DISTRIBUTION

218 Wages.....
219 Supplies and expenses.....
220 Set'g and rem. meters and transformers.....
221 Underground conduits.....
222 Overhead dis. lines.....
223 Underground dis. lines.....
224 Services.....
225 Transformers.....
226 Meters.....

UTILIZATION

227 Commercial arc installation.....
228 Inspection customers' premises.....
229 Municipal arc installation.....
230 " incandescent installation.....
231 Commercial arc repairs.....
232 " incandescent renewals.....

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" Midvale.....
" Gorge.....
55 Ravenna.....

499 DEFENDANT'S EX. T-4.

The Northern Ohio Traction & Light Company to L. E. Beilstein, Dr., Toledo, O.

1910.

As per Invoices or Statement Attached.

Expenses re Selection of Power House Site..... $50.00

August 18th, 1910.

Northern Ohio Traction & Light Co. to L. E. Beilstein.

Services and Expenses on Power Committee, July 18th, 1910 ..... $50.00

Duplicate.

Received Aug. 9, 1910, of The Northern Ohio Traction & Light Company Fifty and 00/100 Dollars, in full of the above account.

L. E. BEILSTEIN.

$50.00.

Please Date, Receipt and Return Voucher Immediately.

The Northern Ohio Traction & Light Co. No. 18734.

AKRON, OHIO, Aug. 6, 1910.

Pay to the order of Chas. Currie Gen'l Manager $50.00 Fifty and 00/100 Dollars.

To The Central Savings & Trust Co., Akron, Ohio.

THE NORTHERN OHIO TRACTION & LIGHT CO.
J. R. NUTT, *Treasurer.*

Countersigned:
WILL CHRISTY, *President.*

[Endorsed:] Pay to the order of L. E. Beilstein. Chas. Currie.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

500 DEFENDANT'S EX. T-5.

The Northern Ohio Traction & Light Company to Ed. Goodwin, Auto Garage, Dr.

1910.

As per Invoices or Statement Attached.

Aug 31, Invoice..... 5.00

Aug. 31, 1910.

Northern Ohio Traction Co., Ed. Goodwin, Dr.

Auto Garage, New Philadelphia, O.

Livery on 2 Autos ordered by Freeman..... $5.00

Goods received —.
Charge 124 New Central P. Sta.
Correct: C. F. M.
Correct: C. C.
Inspecting Power site.
E. M. D.

These autos were for Mr. Currie and party.

(O. K. D. A. S.)

Received Oct. 27. 1910. of The Northern Ohio Traction & Light Company Five & 00/100 Dollars, in full of the above account.
$5.00.

ED. GOODWIN AUTO GARAGE.

Please Date, Receipt and Return Voucher Immediately.

The Northern Ohio Traction & Light Co. No. 19465.

(107345.)

AKRON, OHIO, Oct. 25/10.

Pay to the order of Ed. Goodwin Auto Garage $5.00 Five & 00/100 Dollars.
To The Central Savings & Trust Co., Akron, Ohio.
9909.

THE NORTHERN OHIO TRACTION & LIGHT CO.
J. R. NUTT, *Treasurer.*

[Endorsed:] Ed. Goodwin Auto Garage.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

Form 5—5M—8-19-13—41637

No. 9909 $ 5.00

Ed. Goowin, Auto Garage

New Philadelphia, Ohio.

For Livery On 2 Auto.

Month of September 1910.

The Northern Ohio Traction and Light Company

MISCELLANEOUS

Expense Account			
Material on Hand, Cuyahoga Falls			
" " " Canton			
Electrical Supplies			
Road.			5.00
#124 New Central			
Power Station	5.00		

RAILWAY

1 Supt. Ways and S.			Brought		
2 Ballast			54 Mis. p'rp't sup. & ex.		
3 Ties			55 Sub st'n sup. and exp.		
4 Rails			56 Power purchased		
5 Rail F'st'ng & Joints			57 Power exch'n'd Bal.		
6 Specia Work			58 Other operations, Dr.		
7 Underground con't'n			59 Other operations, Cr.		
8 R. and T. Labor			60 Pass. con., mot., tr'm		
9 Paving			61 Ft. & ex. " " "		
10 Misc. R. & T. exp.			62 Mis. car service emp.		
11 Cleaning & Sanding			63 Mis. car service exp.		
12 Remov, snow, ice, s'd			64 Station employees		
13 Tunnels			65 Station expenses		
15 Bridg., tres, & culv.			66 Carhouse employees		
16 Cross'gs, fence, signs			67 Carhouse expenses		
17 Signal & in'd'k'gsys			68 Op. sig'l int'rl'k'g sys		
18 Tel. & telg. systems			69 Op. tel. & telg. sys.		
19 Other mis. way exp.			70 Ex. frt. coll'ns & deliv.		
20 Poles and fixtures			71 Loss and damage		
21 Underg'd conduits			72 Other transp'n exp.		
22 Transmission system			73 Sal. & ex. gen. of'rs.		
23 Distribution system			74 Sal. ex. gen. of cks.		
24 Misc. electric line exp.			75 Gen. of Sup. & ex.		
25 Buildings & structures			76 Law expenses		
26 Dep'c'n way & str's.			77 Relief Dept. exp.		
27 Other operations, Dr.			78 Pensions		
28 Other operations, Cr.			79 Mis. general exp.		
29 Super. of equipment			80 Other operations, Dr.		
30 Power plant equip't			81 Other operations, Cr.		

Brought.....

TRANSMISSION

209 Sub station wages.....
210 Maint. trans. lines.....
211 Sub station sup. & exp.....
212 Maintaining sub station buildings.....
213 " " " equipment.....

STORAGE BATTERY

214 Wages.....
215 Supplies.....
216 Battery repairs.....
217 " accessories.....

DISTRIBUTION

218 Wages.....
219 Supplies and expenses.....
220 Set'g and rem. meters and transformers.....
221 Underground conduits.....
222 Overhead dis. lines.....
223 Underground dis. lines.....
224 Services.....
225 Transformers.....
226 Meters.....

UTILIZATION

227 Commercial arc installation.....
228 Inspection customers' premises.....
229 Municipal arc installation.....
230 " incandescent installation.....
231 Commercial arc repairs.....
232 " incandescent renewals.....

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54 Akron.....
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" Midvale.....
" Gorge.....
55 Ravenna.....

Form 5—5M—6-19-13—41637

No. 10452 $ 5.30

S. G. Brown.

Caldwell, O.

For Services

Month of November 190.

The Northern Ohio Traction and Light Company

MISCELLANEOUS

Expense Account			
Material on Hand, Cuyahoga Falls			
" " " Canton			
Electrical Supplies			
The Northern Ohio Pr. Company			5.30

RAILWAY

1	Supt. Ways and S.				Brought		
2	Ballast			54	Mis. p'rp't emp. & ex.		
3	Ties			55	Sub st'n sup. and exp.		
4	Rails			56	Power purchased		
5	Rail F'st'ng & Joints			57	Power exch'n'd Bal.		
6	Specia Work			58	Other operations, Dr.		
7	Underground con't'n			59	Other operations, Cr.		
8	R. and T. Labor			60	Pass. con., mot., tr'n		
9	Paving			61	Ft. & ex. " " "		
10	Misc. R. & T. exp.			62	Mis. car service emp.		
11	Cleaning & Sanding			63	Mis. car service exp.		
12	Renov, snow, ice, s'd			64	Station employees		
13	Tunnels			65	Station expenses		
15	Bridg., tres, & culv.			66	Carhouse employees		
16	Cross'gs, fence, signs			67	Carhouse expenses		
17	Signal & in'rl'k'gays			68	Op. sig'l int'rl'k'g sys		
18	Tel. & telg. systems			69	Op. tel. & telg. sys.		
19	Other mis. way exp.			70	Ex. frt. coll'n & deliv.		
20	Poles and fixtures			71	Loss and damage		
21	Underg'd conduits			72	Other transp'n exp.		
22	Transmission system			73	Sal. & ex. gen. of'rs		
23	Distribution system			74	Sal. ex. gen. of clks		
24	Misc. electric line exp.			75	Gen. of Sup. & ex		
25	Buildings & structures			76	Law expenses		
26	Dep'c'n way & str's			77	Relief Dept. exp.		
27	Other operations, Dr.			78	Pensions		
28	Other operations, Cr.			79	Mis. general exp.		
29	Super. of equipment			80	Other operations, Dr.		
30	Power plant equip't			81	Other operations, Cr.		

Brought.....

TRANSMISSION

209 Sub station wages.....
210 Maint. trans. lines.....
211 Sub station sup. & exp.....
212 Maintaining sub station buildings.....
213 " " " equipment.....

STORAGE BATTERY

214 Wages.....
215 Supplies.....
216 Battery repairs.....
217 " accessories.....

DISTRIBUTION

218 Wages.....
219 Supplies and expenses.....
220 Set'g and rem. meters and transformers.....
221 Underground conduits.....
222 Overhead dis. lines.....
223 Underground dis. lines.....
224 Services.....
225 Transformers.....
226 Meters.....

UTILIZATION

227 Commercial arc installation.....
228 Inspection customers' premises.....
229 Municipal arc installation.....
230 " incandescent installation.....
231 Commercial arc repairs.....
232 " incandescent renewals.....

25 Akron.....
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" Kenmore Barn.....
51 Akron.....
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54 Akron.....
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" Canton.....
" Midvale.....
" Gorge.....
55 Ravenna.....
" Bedford.....

501 DEFENDANT'S EX. T-6.

The Northern Ohio Traction & Light Company to S. G. Brown, Caldwell, Ohio, Dr.

1910.

As per Invoices or Statement Attached.

Nov. 10, Invoice..... 5.30

O. K.
C. C.

Noble County Surveyor, S. G. Brown.

CALDWELL, O., Nov. 10, 1910.

C. Currie, Dr., Gen'l Mgr. N. O. T. & L. Co., Akron, O.

To S. G. Brown—one day, inspecting coal lease Noble Co.... $5.00
" " " " —expenses—car fare..... .30

$5.30

Received Nov. 15, 1910, of The Northern Ohio Traction & *Ligh* Light Company Five & 30/100 Dollars, in full of the above account.

S. G. BROWN,
Caldwell, O.

$5.30.

Please Date, Receipt and Return Voucher immediately.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

502 DEFENDANT'S EX. T-7.

The Northern Ohio Traction & Light Company to J. D. Brake, C
Falls, O., Dr.

1910.

As per Invoice or Statement Attached.

Nov. 10, Invoice..... 5.

Nov. 10th, 1910

N. O. T. & L. Co. to J. D. Brake, Dr.

Nov. 10, Meals and Lodging..... 5.

Ex'p's Crew Northern.

O. K.
C. C.

Received payment.

J. D. BRAKE

Received 1910. of The Northern Ohio Traction & Light Co. F
and 50/100 Dollars, in full of the above account.
Receipt attached.
$5.50.

Please Date, Receipt and Return Voucher Immediately.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKe
Clerk.

Form 5—5M—8-19-13—41637

No. 10448 $ 5.50

J. D. Brake.

Cuy. Falls.

For Expenses

Month of November 1910.

The Northern Ohio Traction and Light Company

MISCELLANEOUS

Expense Account			
Material on Hand, Cuyahoga Falls			
" " " Canton			
Electrical Supplies			
The Northern Ohio Power Company		5.50	

RAILWAY

1 Steam Ways ex				Brought	
2 Elect'l			54	Mis. p'rp't sup. & ex.	
3 Ties			55	Sub st'n sup. and exp.	
4 Rails			56	Power purchased	
5 Rail F'st'ng & Joints			57	Power exch'n'd Bal.	
6 Specia Work			58	Other operations, Dr.	
7 Underground con'i'n			59	Other operations, Cr.	
8 R. and T. Labor			60	Pass. con., mot., tr'm	
9 Paving			61	Ft. & ex. " " "	
10 Misc. R. & T. exp			62	Mis. car service emp.	
11 Cleaning & Sanding			63	Mis. car service exp.	
12 Remov. snow, ice, s'd			64	Station employees	
13 Tunnels			65	Station expenses	
15 Bridg., tres, & culv.			66	Carhouse employees	
16 Cross'gs, fence, signs			67	Carhouse expenses	
17 Signal & in'rl'k'guys			68	Op. sig'l int'd'k'g sys	
18 Tel. & telg. systems			69	Op. tel. & telg. sys.	
19 Other mis. way exp.			70	Ex. frt. coll'ns & deliv.	
20 Poles and fixtures			71	Loss and damage	
21 Underg'd conduits			72	Other transp'n exp.	
22 Transmission system			73	Sal. & ex. gen. of'rs	
23 Distribution system			74	Sal. ex. gen. of cks	
24 Misc. electric line exp			75	Gen. of Sup. & ex	
25 Buildings & structures			76	Law expenses	
26 Dep'c'n way & str's			77	Relief Dept. exp.	
27 Other operations, Dr.			78	Pensions	
28 Other operations, Cr.			79	Mis. general exp.	
29 Super. of equipment			80	Other operations, Dr.	
30 Power plant equip't			81	Other operations, Cr.	

Brought.....			
TRANSMISSION			
209 Sub station wages.....			
210 Maint. trans. lines.....			
211 Sub station sup. & exp.....			
212 Maintaining sub station buildings.....			
213 " " " equipment.....			
STORAGE BATTERY			
214 Wages.....			
215 Supplies.....			
216 Battery repairs.....			
217 " accessories.....			
DISTRIBUTION			
218 Wages.....			
219 Supplies and expenses.....			
220 Set'g and rem. meters and transformers.....			
221 Underground conduits.....			
222 Overhead dis. lines.....			
223 Underground dis. lines.....			
224 Services.....			
225 Transformers.....			
226 Meters.....			
UTILIZATION			
227 Commercial arc installation.....			
228 Inspection customers' premises.....			
229 Municipal arc installation.....			
230 " incandescent installation.....			
231 Commercial arc repairs.....			
232 " incandescent renewals.....			

25 Akron.....			
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" Gorge.....			
55 Ravenna.....			

Form 5—3M—6-19-13—41637

No. 10436 $ 65.10

Chas. Currie Gen'l Mgr.,
& Committee.

City,

For Expenses To Inspect Coal

Month of November 1910.

The Northern Ohio Traction and Light Company

MISCELLANEOUS

Expense Account			
Material on Hand, Cuyahoga Falls			
" " " Canton			
Electrical Supplies			
The Northern Ohio Power Company			65.00

RAILWAY

1 Supt. Ways and S.			
2 Ballast			
3 Ties			
4 Rails			
5 Rail F'st'g & Joints			
6 Specia Work			
7 Underground con't'n			
8 R. and T. Labor			
9 Paving			
10 Misc. R. & T. exp.			
11 Cleaning & Sanding			
12 Remov, snow, ice, s'd			
13 Tunnels			
15 Bridg., trss, & culv.			
16 Cross'gs, fence, signs			
17 Signal & in'rl'k'g sys			
18 Tel. & telg. systems			
19 Other min. way exp.			
20 Poles and fixtures			
21 Underg'd conduits			
22 Transmission system			
23 Distribution system			
24 Misc. electric line exp.			
25 Buildings & structures			
26 Dep'c'n way & str's.			
27 Other operations, Dr.			
28 Other operations, Cr.			
29 Super. of equipment			
30 Power plant equip't			

Brought			
54 Mis. p'rp't mp. & ex.			
55 Sub st'n mp. and exp.			
56 Power purchased			
57 Power exch'n'd Bal.			
58 Other operations, Dr.			
59 Other operations, Cr.			
60 Pass. con., mot., tr'm			
61 Ft. & ex. " " "			
62 Mis. car service emp.			
63 Mis. car service exp.			
64 Station employees			
65 Station expenses			
66 Carhouse employees			
67 Carhouse expenses			
68 Op. sig'l int'rl'k'g sys			
69 Op. tel. & telg. sys.			
70 Ex. frt. coll'ns & deliv.			
71 Loss and damage			
72 Other transp'n exp.			
73 Sal. & ex. gen. of'rs.			
74 Sal. ex. gen. of cks.			
75 Gen. of Sup. & ex			
76 Law expenses			
77 Relief Dept. exp.			
78 Pensions			
79 Mis. general exp.			
80 Other operations, Dr.			
81 Other operations, Cr.			

Brought.....

TRANSMISSION

209 Sub station wages.....
210 Maint. trans. lines.....
211 Sub station sup. & exp.....
212 Maintaining sub station buildings.....
213 " " " equipment.....

STORAGE BATTERY

214 Wages.....
215 Supplies.....
216 Battery repairs.....
217 " accessories.....

DISTRIBUTION

218 Wages.....
219 Supplies and expenses.....
220 Set'g and rem. meters and transformers.....
221 Underground conduits.....
222 Overhead dis. lines.....
223 Underground dis. lines.....
224 Services.....
225 Transformers.....
226 Meters.....

UTILIZATION

227 Commercial arc installation.....
228 Inspection customers' premises.....
229 Municipal arc installation.....
230 " incandescent installation.....
231 Commercial arc repairs.....
232 " incandescent renewals.....
233 Repairs customers' installation.....

25 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Ravenna.....
" Barberton.....
" A.....
" B.....
" Beach City.....
" Canton.....
" High St.....
" Midvale.....
" Macedonia.....
" Gorge.....
" Kenmore Barn.....
30 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
31 Ravenna.....
" Bedford.....
" Barberton.....
" A.....
" B.....
" Canton.....
" Massillon.....
" Beach City.....

Brought.....
" Kenmore Barn.....
51 Akron.....
" Cuyahoga Falls.....
51 Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
52 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Midvale.....
" Canton.....
" Gorge.....
53 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
54 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
55 Ravenna.....
" Bedford.....

503 DEFENDANT'S EX. T-8.

The Northern Ohio Traction & Light Company to Chas. Currie, Dr.

1910.

As per Invoices or Statement Attached.

Nov. 11. To Expenses Trip to Coal Mines at Ava, O., L. E. Beilstein, F. S. Borton, J. T. Ross, H. A. Everett, F. F. Wilkinson, W. E. Davis, and Chas. Currie, Hotel,—Ry. fares etc..... 65.10

The Northern Ohio Power Co.

Received — ——, 191–, of The Northern Ohio Traction & Light Company Sixty-five & 10/100 Dollars, in full of the above account.

CHAS. CURRIE.

$65.10.

Please Date, Receipt and Return Voucher Immediately.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

504 DEFENDANT'S EX, T-9.

O. K. C. C.

AKRON, OHIO, Nov. 17, 1910.

Received of The Northern Ohio Traction and Light Co. Seventy-five cents [Dollars]* for 3 meals for porter on trip to Canal Dover and return to Akron.

The Northern Ohio Power Co.
$.75.

R. DOUGLAS.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

[* Word enclosed in brackets erased in copy.]

No. 10431 $ 26.64.

C. R. Chandler, Cashier.

City.

For Sundries.

Month of November 1910.

The Northern Ohio Traction and Light Company

MISCELLANEOUS

Expense Account			
Material on Hand, Cuyahoga Falls			
" " Canton			
Electrical Supplies			
The Northern Ohio Pr. Company.			75.

1 Supe. Ways and S.				Brought			
2 Ballast				54 Mis. p'rp't sup. & ex.			
3 Ties				55 Sub st'n sup. and exp.			
4 Rails				56 Power purchased			
5 Rail F'st'ng & Joints				57 Power exch'n'd Bal.			
6 Specia Work				58 Other operations, Dr.			
7 Underground con't'n				59 Other operations, Cr.			
8 R. and T. Labor				60 Pass. con., mot., tr'm			
9 Paving				61 Ft. & ex. " " "			
10 Misc. R. & T. exp.				62 Mis. car service emp.			
11 Cleaning & Sanding				63 Mis. car service exp.			
12 Remov. snow, ice, s'd				64 Station employees			
13 Tunnels				65 Station expenses			
15 Bridg., tres, & culv.				66 Carhouse employees			
16 Cross'gs, fence, signs				67 Carhouse expenses			
17 Signal & in'rl'k'g sys				68 Op. sig'l int'rl'k'g sys			
18 Tel. & telg. systems				69 Op. tel. & telg. sys.			
19 Other mis. way exp.				70 Ex. frt. coll'ns & deliv.			
20 Poles and fixtures				71 Loss and damage			
21 Underg'd conduits				72 Other transp'n exp.			
22 Transmission system				73 Sal. & ex. gen. of'rs			
23 Distribution system				74 Sal. ex. gen. of clks			
24 Misc. electric line exp.				75 Gen. of Sup. & ex			
25 Buildings & structures				76 Law expenses			
26 Dep'c'n way & str's				77 Relief Dept. exp.			
27 Other operations, Dr.				78 Pensions			
28 Other operations, Cr.				79 Mis. general exp.			
29 Super. of equipment				80 Other operations, Dr.			
30 Power plant equip't				81 Other operations, Cr.			
31 Substation equipment				82 Injuries and damages			

Brought.....

TRANSMISSION

209 Sub station wages.....
210 Maint. trans. lines.....
211 Sub station sup. & exp.....
212 Maintaining sub station buildings.....
213 " " " equipment.....

STORAGE BATTERY

214 Wages.....
215 Supplies.....
216 Battery repairs.....
217 " accessories.....

DISTRIBUTION

218 Wages.....
219 Supplies and expenses.....
220 Set'g and rem. meters and transformers.....
221 Underground conduits.....
222 Overhead dis. lines.....
223 Underground dis. lines.....
224 Services.....
225 Transformers.....
226 Meters.....

UTILIZATION

227 Commercial arc installation.....
228 Inspection customers' premises.....
229 Municipal arc installation.....
230 " incandescent installation.....
231 Commercial arc repairs.....
232 " incandescent renewals.....

25 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Ravenna.....
" Barberton.....
" A.....
" B.....
" Beach City.....
" Canton.....
" High St.....
" Midvale.....
" Macedonia.....
" Gorge.....
" Kenmore Barn.....
30 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
31 Ravenna.....
" Bedford.....
" Barberton.....
" A.....
" B.....
" Canton.....
" Massillon.....
" Beach City.....

Brought.....
" Kenmore Barn.....
51 Akron.....
" Cuyahoga Falls.....
51 Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
52 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Midvale.....
" Canton.....
" Gorge.....
53 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
54 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
55 Ravenna.....
" Bedford.....

No. 10430 $ 106.83

C. R. Chandler, Cashier,
City.

For Freight & Drayage.

Month of November, 1910.

The Northern Ohio Traction and Light Company

MISCELLANEOUS

Expense Account			
Material on Hand, Cuyahoga Falls			
" " " Canton			
Electrical Supplies			
The Northern Ohio Power Co.,			.30

1 Supt. Ways and S.			
2 Ballast			
3 Ties			
4 Rails			
5 Rail F'st'ng & Joints			
6 Specia Work			
7 Underground con't'n			
8 R. and T. Labor			
9 Paving			
10 Misc. R. & T. exp.			
11 Cleaning & Sanding			
12 Remov, snow, ice, s'd			
13 Tunnels			
15 Bridg., tres, & culv.			
16 Cross'gs, fence, signs			
17 Signal & in'tl'k'gsys			
18 Tel. & telg. systems			
19 Other mis. way exp.			
20 Poles and fixtures			
21 Underg'd conduits			
22 Transmission system			
23 Distribution system			
24 Misc. electric line exp.			
25 Buildings & structures			
26 Dep'c'n way & str's.			
27 Other operations, Dr.			
28 Other operations, Cr.			
29 Super. of equipment			
30 Power plant equip't			
31 Substation equipment			
32 Pow'r & cond. sys.			

Brought			
5; sup'rp't sup. & ex			
55 Sub st'n sup. and exp.			
56 Power purchased			
57 Power exch'n'd Bal.			
58 Other operations, Dr.			
59 Other operations, Cr.			
60 Pass. con., mot., tr'm			
61 Ft. & ex. " " "			
62 Mis. car service emp.			
63 Mis. car service exp.			
64 Station employees			
65 Station expenses			
66 Carhouse employees			
67 Carhouse expenses			
68 Op. sig'l int'rl'k'g sys			
69 Op. tel. & telg. sys.			
70 Ex. frt. coll'ns & deliv.			
71 Loss and damage			
72 Other transp'n exp.			
73 Sal. & ex. gen. of'rs.			
74 Sal. ex. gen. of clks.			
75 Gen. of Sup. & ex			
76 Law expenses			
77 Relief Dept. exp.			
78 Pensions			
79 Mis. general exp.			
80 Other operations, Dr.			
81 Other operations, Cr.			
82 Injuries and damages			
83 Insurance			

Brought.....

TRANSMISSION

209 Sub station wages.....
210 Maint. trans. lines.....
211 Sub station sup. & exp.....
212 Maintaining sub station buildings.....
213 " " " equipment.....

STORAGE BATTERY

214 Wages.....
215 Supplies.....
216 Battery repairs.....
217 " accessories.....

DISTRIBUTION

218 Wages.....
219 Supplies and expenses.....
220 Set'g and rem. meters and transformers.....
221 Underground conduits.....
222 Overhead dis. lines.....
223 Underground dis. lines.....
224 Services.....
225 Transformers.....
226 Meters.....

UTILIZATION

227 Commercial arc installation.....
228 Inspection customers' premises.....
229 Municipal arc installation.....
230 " incandescent installation.....
231 Commercial arc repairs.....
232 " incandescent renewals.....

25 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Ravenna.....
" Barberton.....
" A.....
" B.....
" Beach City.....
" Canton.....
" High St.....
" Midvale.....
" Macedonia.....
" Gorge.....
" Kenmore Barn.....
30 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
31 Ravenna.....
" Bedford.....
" Barberton.....
" A.....
" B.....
" Canton.....
" Massillon.....
" Beach City.....

Brought.....
" Kenmore Barn.....
51 Akron.....
" Cuyahoga Falls.....
51 Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
52 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Midvale.....
" Canton.....
" Gorge.....
53 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
54 Akron.....
" Cuyahoga Falls.....
" Bedford.....
" Canton.....
" Midvale.....
" Gorge.....
55 Ravenna.....
" Bedford.....

505 DEFENDANT'S EX. T-10.

AKRON, O., Nov. 18, 1910.

M.

Chas. Currie to Adams Express Company, Dr.

For Transportation of Pa. 2 Caldwell O..... $.30

Charges advanced.
Coal property maps.

The Northern Ohio Power Co.

Received Payment for the Company.
LEFF.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

506 DEFENDANT'S EX. T-11.

The Northern Ohio Traction & Light Company to Chas. Currie, Gen'l Mgr., Dr.

1910.

As per Invoices or Statement Attached.

Expenses for Will Christy, H. A. Everett, Chas. Currie, & W. E. Davis, on Eastern Trip inspecting Car Barns and Power Station..... 446.81

Received —— —, 191–, of The Northern Ohio Traction & Light Company Four hundred forty six and 81–100 Dollars in full of the above account.

CHAS. CURRIE.

$446.81.

Please Date, Receipt and Return Voucher Immediately.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

No. 10809 $ 446.81

Chas. Currie Gen'l Mgr

City

For Expenses Eastern Trip. Chas. Currie. H. A Everett. Will Christy. W. B. Davis.

Month of December, 1910

The Northern Ohio Traction and Light Company

MISCELLANEOUS

Expense Account			
Material on Hand, Cuyahoga Falls			
" " " Canton			
Electrical Supplies			
The Northern Ohio Power Compan		446.81	
Defendant's Ex. T-11.			

1 Super. Ways an				Brought	
2 Ballast			54	Mis. p'rp't sup. & ex.	
3 Ties			55	Sub st'n sup. and exp.	
4 Rails			56	Power purchased	
5 Rail F'st'g & Joints			57	Power exch'n'd Bal.	
6 Special Work			58	Other operations, Dr.	
7 Underground con't'n			59	Other operations, Cr.	
8 R. and T. Labor			60	Pass. con., mot.; tr'm	
9 Paving			61	Ft. & ex. " " "	
10 Misc. R. & T. exp.			62	Mis. car service emp.	
11 Cleaning & Sanding			63	Mis. car service exp.	
12 Remov, snow, ice, s'd			64	Station employees	
13 Tunnels			65	Station expenses	
15 Bridg., tres, & culv.			66	Carhouse employees	
16 Cross'gs, fence, signs			67	Carhouse expenses	
17 Signal & in'rl'k'gsys			68	Op. sig'l int'rl'k'g sys	
18 Tel. & telg. systems			69	Op. tel. & telg. sys.	
19 Other mis. way exp.			70	Ex. frt. coll'ns & deliv.	
20 Poles and fixtures			71	Loss and damage	
21 Underg'd conduits			72	Other transp'n exp.	
27 Transmission system			73	Sal. & ex. gen. of'rs	
23 Distribution system			74	Sal. ex. gen. of cks.	
24 Misc. electric line exp			75	Gen. of Sup. & ex	
25 Buildings & structures			76	Law expenses	
26 Dep'c'n way & str's			77	Relief Dept. exp.	
27 Other operations, Dr.			78	Pensions	
28 Other operations, Cr.			79	Mis. general exp.	
29 Super. of equipment			80	Other operations, Dr.	
30 Power plant equip't			81	Other operations, Cr.	
31 Substation equipment			82	Injuries and damages	
32 Pass'g'r & comb. cars			83	Insurance	
33 Fr., ex., and mail cars			84	Depreciation & renewals	

	Brought.....			25	Akron.....				Brought.....		
	TRANSMISSION				" Cuyahoga Falls.....				" Kenmore Barn.....		
209	Sub station wages.....				" Bedford.....			51	Akron.....		
210	Maint. trans. lines.....				" Ravenna.....				" Cuyahoga Falls.....		
211	Sub station sup. & exp.....				" Barberton.....			51	Bedford.....		
212	Maintaining sub station buildings.....				" A.....				" Canton.....		
213	" " " equipment.....				" B.....				" Midvale.....		
	STORAGE BATTERY				" Beach City.....				" Gorge.....		
214	Wages.....				" Canton.....			52	Akron.....		
215	Supplies.....				" High St.....				" Cuyahoga Falls.....		
216	Battery repairs.....				" Midvale.....				" Bedford.....		
217	" accessories.....				" Macedonia.....				" Midvale.....		
	DISTRIBUTION				" Gorge.....				" Canton.....		
218	Wages.....				" Kenmore Barn.....				" Gorge.....		
219	Supplies and expenses.....			30	Akron.....			53	Akron.....		
220	Set'g and rem. meters and transformers.....				" Cuyahoga Falls.....				" Cuyahoga Falls.....		
221	Underground conduits.....				" Bedford.....				" Bedford.....		
222	Overhead dis. lines.....				" Canton.....				" Canton.....		
223	Underground dis. lines.....				" Midvale.....				" Midvale.....		
224	Services.....				" Gorge.....				" Gorge.....		
225	Transformers.....			31	Ravenna.....			54	Akron.....		
226	Meters.....				" Bedford.....				" Cuyahoga Falls.....		
	UTILIZATION				" Barberton.....				" Bedford.....		
227	Commercial arc installation.....				" A.....				" Canton.....		
228	Inspection customers' premises.....				" B.....				" Midvale.....		
229	Municipal arc installation.....				" Canton.....				" Gorge.....		
230	" incandescent installation.....				" Macedonia.....			55	Ravenna.....		
231	Commercial arc repairs.....										
232	" incandescent repairs.....										

No. 10886 $ 23.67

The W. Bingham Company.
Cleveland, O.

For Hardware.

Month of December 1910.

The Northern Ohio Traction and Light Company

MISCELLANEOUS

Expense Account			
Material on Hand, Cuyahoga Falls			
" " " Canton			
Electrical Supplies			
Northern Ohio Power Co.			7.00

2 Ballast			54 Mis. p'p'l sup. & ex.		
3 Ties			55 Sub st'n sup. and exp.		
4 Rails			56 Power purchased		
5 Rail F'st'ng & Joints			57 Power exch'n'd Bal.		
6 Specia Work			58 Other operations, Dr.		
7 Underground con't'n			59 Other operations, Cr.		
8 R. and T. Labor			60 Pass. con., mot., tr'm		
9 Paving			61 Ft. & ex. " " "		
10 Misc. R. & T. exp.			62 Mis. car service emp.		
11 Cleaning & Sanding			63 Mis. car service exp.		
12 Remov, snow, ice, t'd			64 Station employees		
13 Tunnels			65 Station expenses		
15 Bridg., tres, & culv.			66 Carhouse employees		
16 Crou'gs, fence, signs			67 Carhouse expenses		
17 Signal & in'd'l k'gsys			68 Op. sig'l int'd'l k'g sys		
18 Tel. & telg. systems			69 Op. tel. & telg. sys.		
19 Other mis. way exp.			70 Ex. frt. coll'ns & deliv.		
20 Poles and fixtures			71 Loss and damage		
21 Undergr'd conduits			72 Other transp'n exp.		
22 Transmission system			73 Sal. & ex. gen. of'rs		
23 Distribution system			74 Sal. ex. gen. of cks.		
24 Misc. electric line exp.			75 Gen. of Sup. & ex		
25 Buildings & structures			76 Law expenses		
26 Dep'c'n way & str's			77 Relief Dept. exp.		
27 Other operations, Dr.			78 Pensions		
28 Other operations, Cr.			79 Mis. general exp.		
29 Super. of equipment			80 Other operations, Dr.		
30 Power plant equip't			81 Other operations, Cr.		
31 Substation equipment			82 Injuries and damages		
32 Pass'g'r & comb. cars			83 Insurance		
33 Fr., ex., and mail cars			84 Stationery & printing		

Brought.....			25 Akron.....			Brought.....	
TRANSMISSION			" Cuyahoga Falls.....			" Kenmore Barn.....	
209 Sub station wages.....			" Bedford.....			51 Akron.....	
210 Maint. trans. lines.....			" Ravenna.....			" Cuyahoga Falls.....	
211 Sub station sup. & exp.....			" Barberton.....			51 Bedford.....	
212 Maintaining sub station buildings.....			" A.....			" Canton.....	
213 " " " equipment.....			" B.....			" Midvale.....	
STORAGE BATTERY			" Beach City.....			" Gorge.....	
214 Wages.....			" Canton.....			52 Akron.....	
215 Supplies.....			" High St.....			" Cuyahoga Falls.....	
216 Battery repairs.....			" Midvale.....			" Bedford.....	
217 " accessories.....			" Macedonia.....			" Midvale.....	
DISTRIBUTION			" Gorge.....			" Canton.....	
218 Wages.....			" Kenmore Barn.....			" Gorge.....	
219 Supplies and expenses.....			30 Akron.....			53 Akron.....	
220 Set'g and rem. meters and transformers.....			" Cuyahoga Falls.....			" Cuyahoga Falls.....	
221 Underground conduits.....			" Bedford.....			" Bedford.....	
222 Overhead dis. lines.....			" Canton.....			" Canton.....	
223 Underground dis. lines.....			" Midvale.....			" Midvale.....	
224 Services.....			" Gorge.....			" Gorge.....	
225 Transformers.....			31 Ravenna.....			54 Akron.....	
226 Meters.....			" Bedford.....			" Cuyahoga Falls.....	
UTILIZATION			" Barberton.....			" Bedford.....	
227 Commercial arc installation.....			" A.....			" Canton.....	
228 Inspection customers' premises.....			" B.....			" Midvale.....	
229 Municipal arc installation.....			" Canton.....			" Gorge.....	
230 " incandescent installation.....			" Massillon.....			55 Ravenna.....	
231 Commercial arc repairs.....			" Beach City.....			" Bedford.....	
232 " incandescent renewals.....							
233 Repairs customers' installation.....							

507 DEFENDANT'S EX. T-12.

The W. Bingham Co., Jobbers of Hardware, Metals, Cutlery, Tools, Manufacturer's Supplies, etc.

CLEVELAND, OHIO, Dec. 28, 1910.

Sold to The Northern Ohio Traction & Light Co., Akron, Ohio.

Power House. W. E. Davis.

2—5½ ft. Simmonds Cross Cut Saws 3.50 ..... 7.00
O. K. F. A. L.
Goods Received

F. A. LITTLE.

Charge The Northern Ohio Power Co.
Correct: —.
Correct: C. C.
New Power Plant.

The Northern Ohio Traction & Light Co. No. 20242.

Voucher No. 10886.

AKRON, OHIO, Jan. 10, 1911.

Pay to the order of The W. Bingham Co., $23.67 Twenty three & 67/100 Dollars.
To The Central Savings & Trust Co., Akron, Ohio.

THE NORTHERN OHIO TRACTION & LIGHT CO.
J. R. NUTT, *Treasurer.*

Countersigned:

WILL CHRISTY, *President.*

[Endorsed:] Pay to the order of the National Commercial Bank, Cleveland, Ohio, The W. Bingham Co., J. A. Robinson, Treas.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

508 DEFENDANT'S EX. T-13.

The Northern Ohio Power Co.

Payroll Last Half Dec., 1910.

Engineering and Superintendence.

1. W. E. Ludlow 13 da. 13/31 mo. @ $100.00 Superintendent						40.60	
2. Wm. A. Vordamon 72 hours @ 20¢ Engineer Hold						14.40	55.00

Power Plant Buildings.

Foreman.	3. Fred Cox	¼ mo. 8 days	@	$90.00		22.50	
Laborer.	4. J. I. Cross	78 hrs.	@	17½¢	Hold	13.65	
"	5. Fred Ohse	40 "	"	"		7.00	
"	6. A. Boswell	16 "	"	"		2.80	
"	7. I. R. Harkless	60 "		"	Hold	10.50	
"	8. R. Berger	15 "		"		2.60	
"	9. H. Vance	20 "		"		3.50	
"	10. Bert Powell	9 "		"		1.55	
"	11. Geo. Ellis	10 "		"		1.75	
"	12. P. Humphrey	10 "		"		1.75	
Teams.	13. Frank Crosby	20 "		40¢		8.00	
"	14. Theodore Reed	30 "		"		12.00	87.60
							$142.60

Deductions.

J. I. Cross	Advance by F. A. Little	5.00
F. R. Harkless	" " " " "	5.00
Wm. A. Vordeman	" " " " " (Mrs. Carrol 1.60)	5.00
F. R. Harkless	(Order for board to J. M. Iler)	3.75

Approved.
F. A. LITTLE,
W. E. D.

O. K.
WILL CHRISTY.

The Northern Ohio Traction & Light Co. No. 20234.

AKRON, OHIO, Jan. 10, 1911.

Pay to order of C. H. Lahr Paymaster $30,303.35 Thirty Thousand three hundred & three 35/ Dollars.
To The Central Savings & Trust Co., Akron, Ohio.
THE NORTHERN OHIO TRACTION & LIGHT CO.
J. R. NUTT, *Treasurer.*

Countersigned:
WILL CHRISTY, *President.*

[Endorsed:] C. H. Lahr, Paymaster.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

No. 11135 $ 30,303.25

Chas. H. Lahr, Paymaster.

City.

For Services Dec. 16 To 31 Inclus.

Month of December 190.

The Northern Ohio Traction and Light Company

MISCELLANEOUS

Expense Account			
Material on Hand, Cuyahoga Falls			
" " " Canton			
Electrical Supplies			
Howard St. Reconst.			
The Northern Ohio			
Power Co.,		142.	60

1	Supt. Ways and S.			53	Mis. p'rp't sup. & ex.		
2	Ballast			54	Sub-st'n sup. and exp.		
3	Ties			55	Power purchased		
4	Rails			56	Power exch'n'd Bal.		
5	Rail F'st'ng & Joints			57	Other operations, Dr.		
6	Specia Work			58	Other operations, Cr.		
7	Underground con't'n.			59	Pass. con., mot., tr'm		
8	R. and T. Labor			60	Ft. & ex. " " "		
9	Paving			61	Mis. car service emp.		
10	Misc. R. & T. exp.			62	Mis. car service exp.		
11	Cleaning & Sanding			63	Station employees		
12	Remov. snow, ice, c'd			64	Station expenses		
13	Tunnels			65	Carhouse employees		
15	Bridg., tres. & culv.			66	Carhouse expenses		
16	Cross'gs, fence, signs			67	Op. sig'l int'rl'k'g sys		
17	Signal & in'rl'k'gsys			68	Op. tel. & telg. sys.		
18	Tel. & telg. systems			69	Ex. frt. coll'ns & deliv.		
19	Other mis. way exp.			70	Loss and damage		
20	Poles and fixtures			71	Other transp'n exp.		
21	Underg'd conduits			72	Sal. & ex. gen. of'rs		
22	Transmission system			73	Sal. ex. gen. of cks.		
23	Distribution system			74	Gen. of Sup. & ex		
24	Misc. electric line exp.			75	Law expenses		
25	Buildings & structures			76	Relief Dept. exp.		
26	Dep'c'n way & str's.			77	Pensions		
27	Other operations, Dr.			78	Mis. general exp.		
28	Other operations, Cr.			79	Other operations, Dr.		
29	Super. of equipment			80	Other operations, Cr.		
30	Power plant equip't.			81	Injuries and damages		
31	Substation equipment			82	Insurance		

Brought.....

TRANSMISSION

209 Sub station wages.....
210 Maint. trans. lines.....
211 Sub station sup. & exp.....
212 Maintaining sub station buildings.....
213 " " " equipment.....

STORAGE BATTERY

214 Wages.....
215 Supplies.....
216 Battery repairs.....
217 " accessories.....

DISTRIBUTION

218 Wages.....
219 Supplies and expenses.....
220 Set'g and rem. meters and transformers.....
221 Underground conduits.....
222 Overhead dis. lines.....
223 Underground dis. lines.....
224 Services.....
225 Transformers.....
226 Meters.....

UTILIZATION

227 Commercial arc installation.....
228 Inspection customers' premises.....
229 Municipal arc installation.....
230 " incandescent installation.....
231 Commercial arc repairs.....
232 " incandescent renewals.....

25 Akron.....
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" Gorge.....
55 Ravenna.....

Form 5—536—6-19-13—41697

No. 10951 $ 267 44

The U. G. Ferick Lumber Co.,
City.

For Lumber.

Month of December 1919.

The Northern Ohio Traction and Light Company

MISCELLANEOUS

Expense Account			
Material on Hand, Cuyahoga Falls			
" " " Canton			
Electrical Supplies			
The Northern Ohio Power Company.		18.00	

1	Supt. Ways and S.				Brought		
2	Ballast			54	Mis. p'rp't sup. & ex.		
3	Ties			55	Sub st'n sup. and exp.		
4	Rails			56	Power purchased		
5	Rail F'st'ng & Joints			57	Power exch'n'd Bal.		
6	Specia Work			58	Other operations, Dr.		
7	Underground con't'n			59	Other operations, Cr.		
8	R. and T. Labor			60	Pass. con., mot., tr'm		
9	Paving			61	Ft. & ex. " " "		
10	Misc. R. & T. exp.			62	Mis. car service emp.		
11	Cleaning & Sanding			63	Mis. car service exp.		
12	Remov. snow, ice, s'd			64	Station employees		
13	Tunnels			65	Station expenses		
15	Bridg., tres, & culv.			66	Carhouse employees		
16	Cross'gs, fence, signs			67	Carhouse expenses		
17	Signal & in'tl'k'gsys			68	Op. sig'l int'tl'k'g sys		
18	Tel. & telg. systems			69	Op. tel. & telg. sys.		
19	Other mis. way exp.			70	Ex. frt. coll'ns & deliv.		
20	Poles and fixtures			71	Loss and damage		
21	Undergr'd conduits			72	Other transp'n exp.		
22	Transmission system			73	Sal. & ex. gen. of'rs		
23	Distribution system			74	Sal. ex. gen. of clks		
24	Misc. electric line exp.			75	Gen. of Sup. & ex		
25	Buildings & structures			76	Law expenses		
26	Dep'c'n way & str's.			77	Relief Dept. exp.		
27	Other operations, Dr.			78	Pensions		
28	Other operations, Cr.			79	Mis. general exp.		
29	Super. of equipment			80	Other operations, Dr.		
30	Power plant equip't			81	Other operations, Cr.		
31	Substation equipment			82	Injuries and damages		

Brought.....

TRANSMISSION

209 Sub station wages.....
210 Maint. trans. lines.....
211 Sub station sup. & exp.....
212 Maintaining sub station buildings.....
213 " " " equipment.....

STORAGE BATTERY

214 Wages.....
215 Supplies.....
216 Battery repairs.....
217 " accessories.....

DISTRIBUTION

218 Wages.....
219 Supplies and expenses.....
220 Set'g and rem. meters and transformers.....
221 Underground conduits.....
222 Overhead dis. lines.....
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224 Services.....
225 Transformers.....
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UTILIZATION

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" Canton.....
" Midvale.....
" Gorge.....
55 Ravenna.....
" Bedford.....

09 DEFENDANT'S EX. T-14.

The U. G. Frederick Lumber Co., 59 Cherry Street.

AKRON, OHIO, Dec. 19, 1910.

Sold to The N. O. T. & L. Co., Hamilton Bldg.

#22951.

00 stakes 1 x 3-15"	12.00
00-2 x 2-24" Oak 00 2 x 2-18" "	6.00
	18.00

Power House Gorge.

Goods received: F. A. Little.
Charge The Northern Ohio Power Co. 1—1.
Correct: F. A. L.
Correct: W. E. D.
(#124.) C. C.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

510 DEFENDANT'S EX. T-15.

Rent Notice.

The N. O. T. & L. Co.

11-12-204-6-8-22-24-27.

We beg to notify you that your rent is due and payable on th first proximo at the office of the Company.

Yours respectfully,

THE HAMILTON BUILDING CO.

Room rent $358.00 Jan. 12.50 additional.

Goods received —.
Charge —.
Correct: C. F. M.
Correct: The Northern Ohio Power Co. 12.50.
C. C.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKea Clerk.

511 Mr. Mather: We now offer in evidence defendant's exhibi from A to X inclusive.

Mr. Frank: We object to that offer.

The Court: I'll let it stand the way it is now. Those exhibits th court has admitted are in the record.

Mr. Mather: And those that have been overlooked are not in suppose.

The Court: Those that weren't admitted on an offer here are n admitted.

Mr. Mather: We offer in evidence defendant's exhibit A.

The Court: For what purpose?

Mr. Mather: Simply to show knowledge.

The Court. For that purpose they may be admitted.

Mr. Frank: We desire to reserve an objection and exception.

True copies of said defendant's exhibit A are hereto next annexe and made a part hereof at page 455 to 456 inclusive.

Filed Feb. 4, 1915, Supreme Court of Ohio. Frank E. McKea Clerk.

Form 5—SM—8-19-13—41637

No. 11035 $ 361.00

The Hamilton Building Co.

CITY

For Rent & Office Chair

Month of December 1910.

The Northern Ohio Traction and Light Company

MISCELLANEOUS

Expense Account	34 8.	50
Material on Hand, Cuyahoga Falls		
" " " Canton		
Electrical Supplies		
Northern Ohio Power Company	12.	50

RAILWAY

1	Supt. Ways and S...			Bl st...	
2	Ballast		54	Mis. p'rp't sup. & ex.	
3	Ties		55	Sub st'n sup. and exp.	
4	Rails		56	Power purchased	
5	Rail F'st'ng & Joints		57	Power exch'n'd Bal.	
6	Specia Work		58	Other operations, Dr.	
7	Underground con't'n		59	Other operations, Cr.	
8	R. and T. Labor		60	Pass. con., mot., tr'm	
9	Paving		61	Ft. & ex. " " "	
10	Misc. R. & T. exp.		62	Mis. car service emp.	
11	Cleaning & Sanding		63	Mis. car service exp.	
12	Remov. snow, ice, s'd		64	Station employees	
13	Tunnels		65	Station expenses	
15	Bridg., trss, & culv.		66	Carhouse employees	
16	Cross'gs, fence, signs		67	Carhouse expenses	
17	Signal & in'rl'k'gsys		68	Op. sig'l int'rl'k'g sys	
18	Tel. & telg. systems		69	Op. tel. & telg. sys.	
19	Other mis. way exp.		70	Ex. frt. coll'ns & deliv.	
20	Poles and fixtures		71	Loss and damage	
21	Underg'd conduits		72	Other transp'n exp.	
22	Transmission system		73	Sal. & ex. gen. of'rs	
23	Distribution system		74	Sal. ex. gen. of cks.	
24	Misc. electric line exp.		75	Gen. of Sup. & ex	
25	Buildings & structures		76	Law expenses	
26	Dep'c'n way & str's		77	Relief Dept. exp.	
27	Other operations, Dr.		78	Pensions	
28	Other operations, Cr.		79	Mis. general exp.	
29	Super. of equipment		80	Other operations, Dr.	
30	Power plant equip't		81	Other operations, Cr.	
31	Substation ...				

Brought.....

TRANSMISSION

209 Sub station wages.....
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STORAGE BATTERY

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12 DEFENDANT'S EXHIBIT "A."

TIFFIN, OHIO, Oct. 20, '06.

Will Christie, Akron, Ohio.

DEAR SIR: Pursuant to our conversation yesterday wherein you equested me to write you such propositions as were made to you erbally when I was there, I will state first:

That I hold an option upon the Sackett property below your Gorge roperty, which does not expire for two months 20 days. I hold an ption upon the Falls Rivet & Machine Co. property above yours, hich does not expire for about the same length of time.

I will enter into any one of the three following arrangements:

First: I will buy your property (The N. O. T. & L. Co's. Gorge roperty) or lease it for 99 years with the privilege of renewal, upon ny terms that are reasonable; and agree not to enter into competition ith you in the sale of electrical power or light at any place your company now holds franchises; and if desirable arrangements
13 can be made, will sell the out put of electrical power to your company at a rate cheaper than you can generate it by steam ower.

2. I will sell out my holdings to you, or

3. I will enter into an agreement, equitable to all parties, whereby e will develop jointly the whole power available now, or hereafter urchasable, on the river.

I will state further that I am Sure I am in a position to secure the wo powers immediately above the Rivet Co.'s property, and very ikely the other two yet above them, at Cuyahoga Falls. If this an all be secured the average cost of development per horse-power ould be very much reduced.

You are very well acquainted with the physical conditions of the roperty and the engineering problems to be met with. The reasons hy all should be developed at one time are plainly apparent to you. As time is one of my assets in the development of such property s I now have the right to acquire and such other pieces that I may equire, I would request an answer from you as soon as possible.

Very truly yours,

WILLIS BACON.

14 Mr. Mather: We offer Defendant's exhibits B-1, B-2, and B-3 in evidence.

Objected to.

The Court: Offered for what purpose?

Mr. Mather: For the same purpose.

The Court: For the same purpose, to show knowledge, they may e admitted. Plaintiff excepts.

True copies of said defendant's exhibits B-1, B-2, and B-3 are ereto next annexed and made a part hereof at pages 458 to 461 ereof inclusive.

515 DEFENDANT'S EXHIBIT B-1.

CLEVELAND, O., Feb., 1, 1907.

The Northern Ohio Traction and Light Co., Akron, Ohio.

GENTLEMEN: Pursuant to arrangements made with Mr. Will Christy, I make you the proposition to take a lease of all of your "Gorge" property, from the Rivet Co.'s property to your lower boundary line, for a term of 99 years, with the privilege of renewal for additional term of 99 years. The lease to be framed so as to cover all of the water power rights of said Gorge property with grant of possession of sufficient land and property rights to allow of complete development of the water power of the Cuyahoga River at this point. The said grant to include the Old "Chuckery Canal" and the right to quarry sufficient stone and other material from the premises for said power development.

I will pay at the rate of Six Thousand dollars ($6,000.00) per year, and the taxes assessed or to be assessed upon the said property of which we acquire possession. The rental to be paid quarterly in advance.

The lease to be executed immediately, or as soon as possible after acceptance of this proposition, and to be placed in the hands of the Cashier of any Bank that you may select in the City of Akron, in escrow, for my acceptance and completion of the contract.

That I, or my assigns, are to have possession as soon as the first installment of rent is paid after the first day of April, 1907.

Develop this property within a year and 3 months from granting of this option barring strikes and unavoidable accidents.

(Dam not to be on property) and upon failure upon my part to pay as liquidated damage $5,000. Operations limited to the South side of the river.

That I or my assigns have the option to accept the lease and contract herein provided for, or to refuse to accept the same at any and all times within three months from the date of the acceptance

516 of this proposition by you.

That you are to pay all the taxes assessed for the present year against said property.

That the undersigned, or his assigns, if this proposition is accepted, is to organize a company to develop the said water power and said company is to be obligated in its grant of this property and by contract as follows:

(DEFENDANT'S EXHIBIT B-2).

N. O. T. & L. Co. #2.

That said Company is to be organized upon the basis of:

(*a*) Bonds in amount to pay for organization and complete development of the power or plants to utilize as much of the power as an be economically developed from the Cuyahoga River at or near his point; and for storage reservoirs.

(*b*) Capital stock in amount not to exceed the ratio of one and ne half to one of the amount of bonds, *i. e.* if the bond issue for the urposes above stated should be Two Hundred Thousand Dollars, he stock issue allowable would be Three Hundred Thousand Dolars.

(*c*) The stock to be issued with the provision that at any time ithin the ten years specified hereinafter that you are obligated to purchase the current of this plant, you shall have the privilege 17 and right to purchase or retire the entire issue of stock of the Company to be organized, by paying to the holders hereof par value therefor.

That the above provisions are to be incorporated in the terms of he lease and be obligations voiding the grant if the same are unfulilled upon my or my successors' part.

That you (The N. O. T. & L. Co.) shall pay for the entire product f electric current generated at this plant, contemplated to be built pon the property in this lease to be granted, seven-tenths of one ent per K. W. hour, for a period of ten years from the date of ranting possession of such property.

That you are to have the option at the same rate to purchase all lectrical power generated at any and all auxiliary water power lants at Cuyahoga Falls or vicinity built by the undersigned, his uccessors or assigns; except such power to be used for manufacuring purposes as is incorporated within the grants of the propties of the Walsh Paper Mill Co. and the Acme Wire Co. dam, ow in my possession, which grants recite an obligation to furnish ower back for such mnufacturing purposes as may be conducted upon these particular properties.

518 DEFENDANT'S EXHIBIT B-3.

N. O. T. & L. Co. #3.

That the lease or contracts between us are to have incorporated therein provisions sufficient to amply secure you against competition of this plant or plants in the lighting business in the City of Akron or anywhere else where you now hold lighting or power furnishing franchises.

Respectfully submitted,

WILLIS BACON.

Tiffin, O.

Rent to begin upon day the option contract is fully signed and executed by parties hereto and the same to be drawn by attorneys for the N. O. T. & L. Co. and submitted within 10 days from this the 1st day of April, 1907, and to be signed and executed upon the part of the Grantee within 10 days after signing same by the N. O. T. & L. Co.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

519 Defendant Rests.

Thereupon the court recessed for fifteen minutes, and having reconvened the trial of said cause proceeded further as follows:

Mr. Mather: We ask leave of the Court to reopen our case on one matter, as to the consideration for these deeds, which was omitted.

The Court: You wish to reopen your case?

Mr. Mather: Just to offer these two matters, yes.

The Court: Go ahead.

N. O. MATHER, testified further as follows:

Direct examination.

(By Mr. Nesbit):

Q. I'll ask you whether you know whether there was any consideration passing between The Northern Realty Company and The Northern Ohio Power Company at the time of the conveyances of The Northern Ohio Realty Company to The Northern Ohio Power Company?

Objected to—objection overruled—plaintiff excepts.

A. There was none whatever.

Q. What is the fact in that respect as between—as to the conveyances between The Northern Ohio Power Company and The Northern Ohio Traction and Light Company?

520 Objected to—objection overruled—plaintiff excepts.

A. There was no consideration whatever except as a matter of bookkeeping and that explains the testimony of Mr. Lahr of the charging of certain amounts against The Northern Ohio Power Company. I directed Mr. Lahr as to entering——

Objected to—objection overruled—plaintiff excepts.

——charges made by The Northern Ohio Traction and Light Company against The Power Company, they were made under my direction. I directed the auditor as long as the record title stood in The Northern Ohio Power Company to charge an open account in favor of The Traction Company against The Northern Ohio Power Company.

Q. For what?

A. For all expenditures on the gorge property. When the property was conveyed by The Northern Ohio Power Company to The Northern Ohio Traction & Light Company those items were charged off. There never was any money passing between the two companies at any time.

Q. At the time of the convevance of the property of The Northern Ohio Power Company to The Northern Ohio Traction & Light Company what is the fact as to whether the consent of The Public Utilities Commission was secured for that?

Objected to.

The Court: It doesn't make any difference whether it was or not. I'll sustain the objection.

Defendant excepts.

Mr. Nesbit: We expect the witness would answer, if permitted, that an order was made by The Public Utilities Commission granting permission for said transfer.

521 Cross-examination.

(By Mr. Frank):

Q. You are familiar I take it with the fact that The Northern Ohio Traction and Light Company has had plans to construct a power plant in Noble County where its coal mines are located?

A. No, sir, they never had any plans. They went down there one time in that locality, I don't know but several times on account of making a deal for coal mines in Tuscarawas County. At the time we got them they thought it might be advantageous to build a power plant near the coal supply but the fact of a lack of water was an absolute bar to a power plant in that locality.

Q. The matter of a power house down near their coal mines was being considered as late as the year 1910 was it not?

A. I think not. That trip to the coal mines related to the direction of shipment of coal for the operation of the——

Q. How do you know that?

A. Well, you are asking me and that is my understanding.

Q. How do you know?
A. Positive knowledge?
Q. Yes.
A. I have no personal knowledge of it.
Q. Have you any other kind?
A. Except by hearsay and by interviews and consultations w
the officers of the company.
Q. What officers of the company have you interviewed w
522 reference to that particular voucher?
A. That voucher. None with reference to that vouc
Q. You are giving us absolutely your surmises?
A. You asked for my judgment and I can only give it to y
Q. You are giving me your opinion.
A. I am willing to give my opinion.
Q. You are willing to put in as testimony facts you knew noth
about?
A. I thought you wanted what I did know about it.
Q. You understood the question?
A. Yes, sir.
Q. You have been practising law a good many years?
A. Quite a few years.
Q. You know how to get in testimony when you want to e
though it isn't quite competent?
A. I haven't wanted any testimony I couldn't get on it.

Mr. Mather: We now offer Defendant's exhibit Y, the charte
The Northern Realty Company, for the purpose of showing t
corporation acts as trustee for another only. (See page 434.)

Defendant rests.
Plaintiff rests.

523 Mr. Mather: The Defendant moves the court that the pl
tiff's petition in this proceeding be dismissed for the rea
that there is no evidence proving that there was any attempt
failure to agree with the owner of the property before beginn
the proceeding for the appropriation of the property described
the petition and that the plaintiff has no right to appropriate
property described in the petition.
The Court: That raises the whole issue. This motion will
ruled on after the briefs in the case have been submitted. I'll
serve a ruling on the motion until after the briefs in the case h
been submitted and the court has had an opportunity to study
same.
524 And the above and foregoing, together with the exhi
hereto attached, is all the evidence given or offered to
given during the trial of said cause.
And thereupon counsel for plaintiff and counsel for defend
submitted to the court their briefs, and the court, upon consid
tion of the evidence and the briefs of counsel, on the first day
May, A. D. 1914, decided upon the issue as submitted in said ca
in favor of the defendant, to which decision of the court, the pl

tiff then and there duly excepted, all of which more fully appears of record in said cause.

And thereafter, and within forty days from the decision of the court, to wit, the 11th day of May, A. D. 1914, the plaintiff presented and filed in court, this, its bill of exceptions in said cause, and prayed the court that the same be settled, allowed, signed and made a part of the record in said cause, but not spread at large upon the journal as is provided by law, which is accordingly done this 21 day of May, A. D. 1914.

W. J. AHERN, JR., *Judge.*

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

525 *Notice to Take Depositions, with Instructions, Caption and Certificate.*

STATE OF OHIO,
Summit County, ss:

Case No. 16979.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
vs.
THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION AND LIGHT COMPANY, Defendants.

Pending in the Court of Common Pleas.

The above named defendants will take notice, that on the 13th day of March A. D. 1914, the plaintiff above named will take the depositions of W. R. Kimball and sundry witnesses, to be used as evidence on behalf of Plaintiff in the trial of above case, at Room 1907 of the Hanover Building at 21 Cedar Street in the city of New York in the State of New York, between the hours of eight o'clock A. M., and six o'clock P. M., of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

Service of the above notice is acknowledged.

Done this 10th day of March 1914.

ROWLEY, MATHER & EAGLESON,
Attorneys for Defendants.
FRANK REAM,
Attorney for Plaintiff.

Instructions for Taking Depositions to be Admitted as Evidence in the Courts of the State of Ohio.

(Begin with the Caption on Next Page.)

Depositions may be taken by stating facts in reply to questions first written down, or in a narrative form.

When the attendance of a witness, before an officer authorized to take Depositions, is required, the subpœna shall be issued by such Officer.—Section 5248.

The subpœna shall be served either by reading or by copy, delivered to the Witness or left at his usual place of residence, but such copy need not contain the name of any other witness.—Section 5249.

Disobedience of a subpœna, a refusal to be sworn, except in case of a refusal to pay fees on demand, a refusal to answer as a Witness, or to subscribe a deposition when lawfully ordered, may be punished as a Contempt of Court or Officer by whom attendance or testimony of the Witness is required.—Section 5251 and 5252.

In regard to "Attachment against Witness," and the "Proceedings for Contempt of Court by Witness, and Punishment," see Sections 5253, 5264 and 5256.

A Witness cannot be compelled to go out of his County, where he resides, to testify.—Section 5250.

Depositions may be taken, In this State, before the Judge or the Clerk of the Supreme Court, a Judge or the Clerk of the Court of Common Pleas, a Probate Judge, a Justice of the Peace, Notary Public, Mayor or Chief Magistrate of a Municipal Corporation, Master Commissioner, or any person empowered by a Special Commission.—Section 5269.

Depositions may be taken, Out of this State, before a Judge, Justice or Chancellor of any Court of Record, a Justice of the Peace, Notary Public, Mayor or Chief Magistrate of any Municipal Corporation, or Commissioner appointed by the Governor of this State to take Depositions, or any person authorized by a Special Commission from this State.—Section 5270.

Depositions taken by an officer lawfully authorized to take the same, having a seal of office, whether a resident of this State or elsewhere, shall be admitted as evidence upon the certificate and signature of such officer under his official seal; and no other or further act of authentication shall be required.—Section 5279.

If the officer before whom the same is taken has no official seal, the Depositions if Not taken in this State, shall be certified and signed by such officer, and shall be further authenticated by the Certificate and Seal of the Secretary or other Officer of State, who is the Custodian of the Great Seal of the State; or the Certificate and Official Seal of the Clerk or Prothonotary of any Court of the State where taken, attesting that such officer was, at the time of taking the same, authorized to take said Depositions.—Section 5279.

But, if Depositions are taken within this State, by an officer having

no seal, or if taken within or without this State under Special Commission, it shall be sufficiently authenticated by the official signature of the Officer or Commissioner taking the same.—Section 5279.

The Officer before whom Depositions are taken must not be a Relative or Attorney of either party, or otherwise interested in the event of the action or proceeding.—Section 5271.

The Depositions shall be written in the presence of the Officer before whom they are taken, either by the Officer, the Witness, or some other disinterested person, and Subscribed by the Witness.—Section 5275.

If there are adjournments, they should be noted by the Magistrate or other Officer, from day to day at the close of the day.—Section 5273.

Objections to questions or answers claimed to be illegal, or to witnesses claimed to be incompetent to testify, should be entered by making a short note of such objection.

Each Witness must sign his own Deposition.—Section 5252 and 5275.

The notice must be attached to the Depositions and enclosed with them.

When Depositions are taken under an agreement, the above instructions will be followed, except where they are modified by the agreement. In such cases the agreement must be followed. It should be attached to the Depositions and referred to in the Caption, as the Notice is when taken under a Notice.

The Depositions must be commenced on the day named in the notice, and some portion of a Deposition taken on each successive day, Sundays excepted, adjournments being from Saturday to Monday: Sundays and National Holidays not being regarded.

If taken by interrogatories and cross-interrogatories, under agreement or otherwise, every interrogatory or cross-interrogatory must be put to each witness, and answered so far as he can answer it, and the answer written down.

The Deposition must show that each interrogatory and cross-interrogatory was thus put and answered.

The fees for taking the Depositions should be taxed, and a memorandum made by whom they were paid.—Section 5283.

The whole Must be sealed up by the Magistrate or Officer taking the Depositions, the title of the action of proceeding endorsed on the outside, with the name of the Officer taking the same, and "Depositions on behalf" [the party taking the same], and addressed to the Clerk of the Courts, or to such Justice, Mayor or other Judicial Officer, Arbitrator, Referee, or Master, where the action or proceeding is pending.—Section 5276.

Let the Magistrate or other officer taking the same also endorse: "These Depositions sealed up, addressed and transmitted by me," and sign his name to such endorsement.

For Certificate of the Officer, and Cost Bill, etc., follow the printed form on the third page.

26 Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

527 STATE OF OHIO,
Summit County, ss:

The Court of Common Pleas.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

NEW YORK CITY, March 13, 1914.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
against
THE NORTHERN REALTY COMPANY et al., Defendants.

Appearances:

John C. Frank, for the plaintiff.
N. O. Mather, for the defendants.

Depositions taken before me, Jessie MacLardy, a notary public within and for the County of Queens, Certificate filed in New York County, and State of New York, pursuant to the annexed notice at the time and place therein specified, to be read in evidence on behalf of the plaintiff in an action pending in the Court of Common Pleas in and for Summit County in the State of Ohio, in which The Cuyahoga River Power Company is plaintiff and The Northern Realty Company and The Northern Ohio Traction and Light Company are defendants.

It is agreed that the defendants object to each and every question on the ground of incompetency and irrelevancy, and such objection need not be repeated after each and very question.

It is agreed between the parties that the witness shall sign the stenographer's notes of their testimony and that the notary and stenographer may sign their names to the transcribed testimony.

DANIEL R. BACON, being duly sworn, testified as follows:

By Mr. Frank:

Q. You may state your name and your age.
528 A. Daniel R. Bacon; 31.
Q. And your residence is where?
A. Ridgewood, New Jersey.
Q. And what is your business or occupation?
A. Consulting engineer.
Q. And where is your place of business?
A. 30 Church Street, New York.
Q. Are you connected with any firm in the engineering business?
A. Yes, Bacon & Trubenbach.
Q. How long have you carried on your profession?
A. Since 1904.
Q. What if any experience have you had in your profession in the development or construction of water power and water power plants?
A. I was assistant electrical engineer for Sanderson & Porter, and

lid considerable work for them in the development of consolidated ighting companies and hydro electric plants at Montpelier, Vermont, he McCall's Ferry project at McCall's Ferry on the Susquehanna River, the Stanislaus Hydro electric development on the Stanislaus River in California.

Q. Any others?

A. I have made reports recently on the Neversink River power development and the Shohola Falls development.

Q. The Montpelier development which you have spoken of, how extensive a proposition was that?

A. That was about 2000 kilowatt development.

Q. The Susquehanna project was how much of a project?

A. About 200,000 horse power.

Q. And the other proposition you mention, the Stanislaus?

A. That was 25,000 horse power.

Q. Are you acquainted with Mr. William R. Kimball of the Cuyahoga River Power Company?

A. I am.

Q. And have you done any work at any time for the Cuyahoga River Power Company?

A. Yes.

Q. In connection with the development of the water power on the Cuyahoga River?

A. Yes.

Q. When did you do the work that you speak of?

A. During 1912—I think it was 1911 and 1912.

Q. Have you been over any part of the ground that is involved in the project of the Cuyahoga River Power Company?

A. Yes.

Q. And what part of it have you been over?

A. I made a personal inspection of that part of the river in the neighborhood of the new power plant of the Northern Ohio Company up to the old dam on the Falls River property.

Q. And just in what connection or for what purpose was your examination?

A. With a view to determining whether a temporary plant could be constructed on the site of the Old Falls River Company's dam.

Q. Do you know the property of the Northern Realty Company from the bridge across the Cuyahoga River upwards toward the village of Cuyahoga Falls,—are you familiar with that property in general way?

A. Yes.

Q. Have you been on that property?

A. Part of it.

Q. Aside from a personal examination of the premises, have you made any other examination or study of the project of the Cuyahoga River Power Company?

A. Yes.

Q. And by what means?

A. By means of the topographical maps of the section.

Q. In speaking of the topographical maps of the section, what maps do you have reference to?

A. The United States government geological survey topographical sheets.

530 Q. Those topographical sheets, what do you know as to their accuracy?

A. They are considered accurate for all preliminary work, within ten per cent.

Q. Have you assembled any of the topographical publications of the geological survey with a view of getting the project of the Cuyahoga River Power Company?

A. Yes.

Q. Have you such a map as that, such an assembled map?

A. Yes.

Q. Will you kindly produce it for us?

Maps offered marked Plaintiff's Exhibit No. 1 and Plaintiff's Exhibit No. 2.

Q. I now direct your attention to the map marked Plaintiff's Exhibit No. 1 and identified by the signature of Jessie MacLardy, notary public, under date of March 13, 1914, and ask you whether this is the map you have reference to in your last answer?

A. Yes.

Q. State whether or not this series of maps covers the region involved within the project of the Cuyahoga River Power plant as you have stated?

A. Yes.

Q. Are you willing to have that map attached to your deposition and made a part of it?

A. Yes.

This is accordingly done.

Q. I now direct your attention to the map marked Plaintiff's Exhibit No 2, identified further by the signature of Jessie MacLardy, notary public, under date of March 13, 1914, and ask you whether you have examined this map?

A. Yes.

Q. Are you able to state what if any relation there is between this map and the previous map marked Exhibit No. 1?

A. This map appears to be a tracing covering only the essential features of the development of the Cuyahoga River Power Company project.

531 Q. Have you examined this map sufficiently so that you are able to state whether or not it is a tracing, whether it is on the same scale?

A. It is on the same scale.

Q. And have you examined it sufficiently so that you know it is a tracing of a portion of the topographical maps?

A. Yes.

Q. Are you willing to have this map attached to your deposition nd made a part of it?
A. Yes.

This was accordingly done.

Q. The map Exhibit No. 2—state whether or not that shows any natters which are not shown on the topographical maps, and in eneral what does it show in that respect?
A. It shows the location of the dams and pipe lines and canals nd more in detail the reservoir sites than shown on the topo- raphical map.
Q. Mr. Bacon, I think you said you are familiar in a general ay with the project of the Cuyahoga River Power Company?
A. Yes.
Q. That project comprises what features and development, state general terms.
A. Comprises a dam across the Cuyahoga River at Hiram, form- ng the Hiram reservoir, the using of the natural river bed of the uyahoga River to a point called the Gaylord Dam and from that oint the water is diverted through canals and channels into Mud reek and Brandywine Basin and from there through pipe lines nd flumes to the power plant located at the mouth of the Brandy- ine Creek near Vaughan.
Q. Are you able to tell either exactly or approximately the amount of fall at Vaughan that would be derived from such a de- 32 velopment.
—. Approximately 350 foot net head.
Q. The dams and reservoirs and other construction which ou have related, are you able to state where they are situated with ference to the property of the Northern Realty Company which ou examined as to being above or below the property of the North- n Realty Company.
A. Above the property.
Q. As an engineer are you able to state whether or not a develop- ent of the water power of the Cuyahoga River may or may not be ade that does not involve the construction of the dam at some oint?
A. No.
Q. In the course of your work and study for the Cuyahoga River ower Company have you made any estimates of cost of construc- n or any estimates of any sort?
A. Yes.
Q. What sort of estimates did you make?
A. I made estimates of the cost of construction and estimates of obable revenues.
Q. Have you also made estimates of the electrical energy or power at will result from the development of the Cuyahoga River Power mpany?
A. Yes.
Q. In order to make the development of the water power of the yahoga River, state whether or not any diversion of the water of

the river is necessary at some point above the river above the property of the Northern Realty Company?

A. To make a maximum development it is necessary.

Q. That is the fact as to whether such diversion is necessary to make the development proposed by the Cuyahoga River Power Company?

A. Yes.

Q. What is the fact as to whether there is any site for a
533 dam for the development of the water power of the Cuyahoga River below the property of the Northern Realty Company?

A. No site that I know of.

Q. If a diversion of the water of the Cuyahoga River is made above the property of the Northern Realty Company, what, if any, interference results by such diversion to the property of the Northern Realty Company?

A. There would be no water except such water as comes in below the Gaylord Bridge dam.

Q. Or flood waters?

A. Yes.

Q. From your examination and investigation and study of the Cuyahoga River Company what do you say as an engineer as to whether or not from an engineering, financial and other standpoints, the project is a practical and feasible one?

A. It is.

Q. Do you know of any unusual engineering difficulties that the project involves?

A. No.

Q. If you are able to do so, state how much electric power would be produced annually by the development of the river as proposed by the Cuyahoga River Power Company?

A. Between fifty and fifty-five million kilowatt hours annually, as I remember it.

Q. What does that mean in kilowatt hours per day?

A. You will have to divide by 365.

Q. What part does the Hiram Reservoir play in the project of the Cuyahoga River Power Company?

A. It is necessary in order to maintain a regular flow of the river at 300 cubic feet per second.

Q. That means 300 cubic feet of water per second?

A. Yes.

Q. For what period of time?

A. The reservoir is of such an extent that it will conserve
534 sufficient water to maintain that flow with two consecutive dry years.

Q. If you are able to state, tell us how much the Cuyahoga River fluctuates between the dry stages or the low stages and the high stages of the river?

A. I am not able to state off-hand.

Q. What if any data are you familiar with that shows that information.

A. The tabulated data contained in the report of H. Van Schon

is made up from the readings of the United States Govern-
Observation Stations.

By Mr. Mather:

Mr. Bacon are you familiar with the property that is described
petition in this case?
How familiar?
That is, do you know, could you identify the property on the
oga River and the adjacent land that is described in the peti-
f the Cuyahoga River Power Company in this proceeding?
Part of it.
How recently have you seen it?
Not since 1912.
Do you know anything of the present development of the
t that point made by the Northern Ohio Traction & Light
ny?
No.
You do know as a matter of fact that the land described in
tition in this case describes the entire bed of the river and a
of the banks on either side from a point below where the
t dam is located to a point in Cuyahoga Falls village; do you
nything of a dam being located there at present?
A. I know there is a dam built.
Q. You do not know the location?
A. No.
f a dam were built within the limits of the land described in
tition in this case and backed the water to the village of
oga Falls or to a point within the limits of the village of
oga Falls, and that dam was 60 feet high and a hydro elec-
ant had been built a distance of 2,700 feet below it having
city of about 3,000 horse power, and a steam plant had been
within the limits of the land described in the petition with
city of 30,000 horse power or more, both using the water
ned in the reservoir made by that dam, would you say that
velopment proposed by the Cuyahoga River Power Company
be destructive of that use?
Yes.
You say that if the plan which you have mapped out and to
you have testified were carried out that there would be no
flowing in the natural channel of the Cuyahoga River over
operty described in this petition, except the seepage and what
flow over and below what is known as Gaylord's Dam?
Yes.
Do you know what proportion that would be of the present
the river?
No.
What would you estimate it to be of the present flow?
A very small percentage.
Part of one per cent?
Except what would come over the Gaylord Dam at flood times.
If the river were developed to its maximum capacity, there

would not be any flood times, it would be contained in the reservoi would it not?

A. There would be some flood times when the reservoirs are fu and run off due to what is commonly called a cloud burst. Cana would carry the water off.

Q. Such a condition as that then would not mean a ma

536 imum development of the river?

A. Yes.

Q. If it were developed to its maximum capacity it would mea that there would be reservoirs of such a capacity as would contai all the water?

A. I do not know of any hydro electric plant that would n lose some water.

Q. Isn't that what a maximum development would mean?

A. Such a development is practically impossible.

Q. Most times when the flood waters would overflow what yo call a maximum development would be rare occurring may be i certain periods of the year when there were high floods?

A. Yes.

Q. And if there was a dry year there would be no such ove flow?

A. Yes, at times.

Q. What percentage of the natural flow of the river would yo estimate that to be?

A. I have never estimated.

Q. You don't know as a matter of fact, do you, Mr. Bacon, tha the land described in the petition in this case includes the bed of th Cuyahoga River and the banks thereof upon which is already buil the dam, hydro electric power plant and the steam power plant o the Northern Ohio Traction & Light Company?

A. The dam is built on the property, yes.

Q. You never saw the power plant?

A. I saw the foundation of the steam plant.

Q. And was that upon the land described in the petition?

A. I am not positive. I never made a survey to determine tha fact.

537 Q. It was very close to the water's edge of the river wa it not?

A. Yes.

Q. You have not seen either the power plant or the hydro elec tric plant since they were completed.

A. No.

Q. And you know nothing about their capacity?

A. Only from hearsay.

DANIEL R. BACON.

ALGER A. CONGER, being duly sworn, testified as follows:

By Mr. Frank:

Q. You may state your name and your age?

A. Alger A. Conger; 38½.

Q. Where do you reside?
A. Shelbourne Falls, Mass.
Q. And what is your line of business?
A. In the engineering line.
Q. How long have you been engaged in that business?
A. Principally for ten or eleven years—eleven years.
Q. And are you engaged with any firm?
A. Yes.
Q. What firm?
A. The Power Construction Company.
Q. Which is located at what place?
A. Shelbourne Falls, Mass.

Q. What has been your general experience in the construction of water power plants and development of water power during the time that you have been engaged in that iness?

A. Chronologically more or less?
Q. Yes.
A. For some years I was principally engaged in engineering, n engineering and designing on numerous plants,—the Comerio ver development at Porto Rico, the West Buxton Power develop- nt in Maine, the Le Crosse Water Power Company's developments Wisconsin, the Central Georgia Power Company in Georgia, the nnecticut River Power Company in Vermont and the Deerfield er Power Company developments in Massachusetts; and the ineering of a good many others which have or have not been eloped.
Q. These developments that you have spoken of were they for same firm that you are now with?
A. Some with the same firm.
Q. Were you ever connected with the firm of J. G. White & npany?
A. I was for some four or five years.
Q. And what is that firm in its general character?
A. It is an engineering and constructing firm, interests capital, lds and engineers projects.
Q. Is it engaged in engineering in the water power business on mall or large scale?
A. On a large scale, I should say.
Q. One of the largest concerns in the world, is it not?
A. It is one of the largest that I am familiar with at least.
Q. I will ask you generally now as a result of your experience the water power business whether you have secured such knowledge and are familiar with the business and understand the various matters and details that are connected with the development of a water power project?
A. I am familiar with most of them.
Q. Have you at any time done any work for the Cuyahoga River ver Company?
A. I spent a week or something like that in going over the proj-

ect—several days at least in going over the ground and studying t proposition.

Q. Were you on the ground that is involved?

A. I was on the ground.

Q. Who if anybody was with you in your work on that matt

A. I think Mr. Kimball introduced me to a man by the name Willis Bacon.

Q. What part of the territory did you actually go over, as nea as you can recall.

A. Nearly everything involved and some other places not volved.

Q. Did you become familiar with the various elements and pha of the project?

A. Nearly all I should say, all I considered of sufficient imp tance outside of marketing and the details of properties I will s I went over properties that were involved as a general thing, did not go into details.

Q. I understand you did not go into details in the matter possible or probable marketing of the output?

A. No.

Q. Did you examine the site of the reservoir at Hiram or Cuyahoga County?

A. I did.

Q. And became familiar with the general characteristics and co struction of the proposed reservoir?

A. Yes.

Q. Starting with Hiram Reservoir state in general what t
540 project of the Cuyahoga River Power Company as studi by you involved?

A. My recollection is a little hazy inasmuch as I have not go over it in a long time until last night. The principal features should say consist in a storage dam located at Hiram which wou form the Hiram Reservoir with suitable controlling works for fe ing the water down the river channel to a point, Cuyahoga Fal where it was proposed to construct a dam and divert the strea through a channel to be excavated into Silver Lake and throu another divide into another small lake nearby and through t high land into what is called the Mud Creek Valley or Basin. this valley there was to be another dam which would permit a co siderable storage and form a channel to carry the water for so distance farther north to additional channels which would ca it into the Brandywine Basin, which would be also made into pond or reservoir by a dam suitably located some distance alo the valley—I could identify the spot I guess—at which there wou be a diverting works to feed a canal which would carry the fl down the general valley of the Brandywine to a point on the hi about opposite, north of the Brandywine, from which point t water would be carried to a power house located near the mouth the Brandywine.

Q. At the power house how much fall, if you know, was deriv from this development?

A. I have no definite recollection on that point. I simply have
en the reports. I do know that I verified at that time within rea-
nable limits the amount of fall mentioned in the reports.
Q. Did you also go over the territory, over that part of the Cuya-
oga River which lies below the village of Cuyahoga Falls?
A. All or nearly all.
41 Q. Did you examine or become familiar with the course and channel of the Cuyahoga River, say from Cuyahoga Falls outherly to what was known as the Big Falls of the Cuyahoga?
A. I do not recall the name in particular, but I examined all of he principal falls, at least inspected all of the principal falls below uyahoga Falls.
Q. If the development of the Cuyahoga River Power Company ere made as proposed and outlined by you, what, if any, effect would have upon the power and water in the river below the village of uyahoga Falls or below Gaylord Dam?
A. Below the Gaylord Dam, immediately below, there would be ractically no water, excepting small amounts in very short times.
Q. And that stretch of the river which would have no water would e between what points?
A. Between the Gaylord Dam and the point where the next tribu-ary below of consequence enters. I do not recall the relative posi-ion of that point.
Q. Do you refer to the Little Cuyahoga River?
A. I believe so.
Q. If the property of the Northern Realty Company and the Northern Ohio Traction & Light Company be below the Gaylord Dam and above that tributary which we will call the Little Cuyahoga River, would then the property of the Northern Realty Company and the Northern Ohio Traction & Light Company receive any substan-ial amount of water excepting what comes at flood times as you have stated?
A. It would not, assuming ordinary operation.
Q. From your examination of the Cuyahoga River as you have outlined it, state whether or not in your opinion any large develop-ment of the water power of that river can be made without taking that part of the river which lies below the Gaylord Dam and
42 above the next tributary of the Cuyahoga River?
A. That brings in the matter of the position of that tribu-ary, the point where that enters with respect to the fall of the river, which I do not at the moment recall.
Q. Calling now your attention to Plaintiff's Exhibit No. 2, and on he assumption that the Gaylord Dam is located on the Cuyahoga t the point marked Gaylord Dam A, and that the property of the efendants in this case lies between the Gaylord Dam as there shown nd the point where the Little Cuyahoga River as shown on this map mpties into the Big Cuyahoga River, state whether or not the con-truction of the project of the Cuyahoga River Company would be r would not be destructive of the water fall and water rights and iparian rights of the defendant?
A. It would.

Q. Would it or would it not necessitate the taking of that property?

A. It would.

Q. What is the general character of the country through which the Cuyahoga River flows after it emerges from the high banks or gorge below Cuyahoga Falls?

A. The portions which I recall consisted of a rather wide valley with quite a gradual slope of the stream.

Q. Do you know of any large substantial maximum development that may be made of the water power of the Cuyahoga River by means of the construction of dams located below the village of Cuyahoga Falls.

A. How near a maximum. Supposing one were to get a 300 foot head and create a practically maximum development, I suppose that would be near enough so that it would be in the class of a maximum development. I could not say positively that it would not be physically possible to develop somewhere near the amount
543 of head proposed by means of a dam located somewhat farther down stream, the difference in head being fixed by the height of the dam. The location of the cities and towns, as I recall, would be prohibitive.

Q. That would involve flooding the property of the Northern Ohio Traction & Light Company?

A. Any such development would involve utilizing or flooding the properties referred to; it would not be what I call a maximum if it did not include that 300 feet of head.

Q. Did you make any estimates of cost of construction of the project of the Cuyahoga River Power Company?

A. I did.

Q. And did you also make any estimates as to the amount of electical power or energy that would result from the development?

A. I did.

Q. From your examination of the project of the Cuyahoga River Power Company and the water shed and position of the Cuyahoga River, state whether or not in your opinion the project of the Cuyahoga River Power Company is feasible and practical from an engineering standpoint and from a financial standpoint?

A. From an engineering standpoint the project I consider feasible. I do not recall the figures. I have not seen the figures on the financial end.

Q. Do you know of any unusual engineering difficulties that would be involved in the project?

A. No.

Q. State whether or not the project is a logical and proper development of the water power of the Cuyahoga River in your opinion?

A. I believe so. It seems to utilize the natural features to good advantage. I could not say positively that they could not be utilized as well in another way along modified lines.

544 Q. That is, some modifications might be possible so far as your recollection goes?

A. I could not say that they would not be possible. I did not consider all possible means of development.

By Mr. Mather:

Q. Mr. Conger, do you know anything about the development of the river that has been made by the Northern Ohio Traction & Light Co. below Cuyahoga Falls?

A. I am not at all familiar with it.

Q. You know nothing about the location of the present dam which was built about two years ago or a year ago, nor about the steam plant, nor the hydro electric plant built by the Northern Ohio Traction & Light Company?

A. No; I heard that something was being done.

ALGER A. CONGER.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

(Here follow maps marked pp. 545 (omitted in printing) and 546.)

547–549 *Certificate to Depositions.—(Revised Statutes, Section 5280.)*

THE STATE OF NEW YORK,
New York County, ss:

I, Jessie MacLardy, a Notary Public in and for the County and State aforesaid, duly commissioned and qualified, Do Hereby Certify, that the above named Daniel R. Bacon and Alger A. Conger, were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the Depositions by them respectively subscribed as above set forth, were reduced to writing by* me, being a proper person and not interested in the action, in my presence, and in the presence of the witnesses respectively, and were subscribed by said witnesses, in my presence, and were taken at the time and place in the annexed Notice specified, and continued from day to day as above set forth.

I do further Certify that I am not a Relative or Attorney of either party, or otherwise interested in the event of this action.

In Witness Whereof, I have hereunto set my hand and Seal of Office, this 13th day of March, A. D. 1914.

[Seal Jessie MacLardy, Notary Public, Queens County, N. Y.]

JESSIE MACLARDY.

Cost Bill.

Writing Depositions, at 10 cts. per 100 words	$5.20
Issuing Subpœnas, 50 cents each	....
Swearing Witnesses, 4 cents each	8
Clerk's Certificate	....
Postage	54
	....
	....
	$5.82

Fees of .....Constable.

Service of	Subpœna	$.....
Mileage on	Subpœna	$.....
		$.....
		$.....

*If the depositions were written by the officer who certifies to the same, simply write "me" on this line, and strike out the words in bold face type that follow.

Witness Fees.

5 cents per day and 5 cents Traveling Fees, each mile, both ways.)
..... $.....

$.....

Total Costs of Taking Depositions.....$.....

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean.

Received of Cuyahoga River Power Co., the sum of $5.82 in full my fees, as above specified.

JESSIE MacLARDY.

0 Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

P'T'FF'S EXHIBIT 21.

ATE OF OHIO,
Summit County, ss:

In Common Pleas Court.

No. —.

P't'ff's Exhibit 21.

C. R. P. Co.
vs.
N. O. R. Co.

A. M. W.

lydro-Electric Development on Cuyahoga River, Ohio, by H. von Schon, Cons. Engr.

Cuyahoga River Power Co., 1907-16 Hanover Bank Building, lew York.

51 H. von Schon, M. Am. Soc. C. E., Consulting Engineer, Detroit, Mich, Wayne Co. Bank Bldg.

December 29th, 1908.

Mr. W. R. Kimball, New York, N. Y.:

DEAR SIR: In accordance with your Commission for my report on the hydro-electric opportunity of the Cuyahoga river, Ohio, I have made such investigations, examinations and surveys as are required to determine the essentials, feasibility of development, power, output and cost, and I find that:

1. Development of water-power on the Cuyahoga river is feasible on a resourceful commercial scale, provided the flow is regulated;

2. Storage opportunities are available to realize close flow regulation;

3. Eight thousand electric horse-power can be developed for continuous service;

4. The cost of delivering this power at Cleveland or Akron approximates seven hundred thousand dollars.

The data, arguments, and conclusions upon which these findings are based form the subject of my following report.

Respectfully,

(Signed) H. von SCHON,
Consulting Engineer.

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Of the Treatment of the Report Subject.

subject of this report is the development of hydro-electric from the Cuyahoga river, Ohio, at or near the town of Cuya- Falls.

dro-electric power utilizes as the source of energy the weight of g water; the available quantity of water and the fall are the rceful power factors which are expressed as Flow and Fall. w originates from the rain and snow falling on that territory drains into the portion of the water course to be utilized; Fall difference of the elevations of the water surfaces at the points it is accumulated for the development and where it finds its after its energy is converted into useful work.

e method of development is the program which in this case is of Diversion, the water is to be conducted from its point of nulation by artificial channels and conduits to the lower point of available fall and there passed through hydraulic Turbines h generate mechanical power, this in turn is to be converted electrical energy by the aid of Generators; the resulting electric nt is to be transmitted to a distant point for power and light ce.

Of the Catchment Area.

he Catchment area which is to be utilized in this proposed er development is all that part of country which contributes he Cuyahoga river upstream of the Northern boundary of the of Cuyahoga Falls and to the Brandywine river upstream of settlement of Little York in Cuyahoga County, and this aggre- s about three hundred and fifty (350) square miles as measured n Government topographic plans. This area practically embraces he Drainage into the Big Cuyahoga river and into the Brandy- e which lies on the plateau rising some 600 feet above the level Lake Erie. It is lightly timbered, generally cultivated, the sur- being of soil and loam overlying clay and rock.

Of Precipitation.

Precipitation volume is expressed in inches of depth, that falling the Cuyahoga catchment area has been observed by the Govern- nt for many years at Akron, Hillhouse, Hiram, Hudson and w Berlin. A true copy of the monthly precipitation at these

points as reported by the Government from 1892-1905 appears in Appendix A.

The mean annual precipitation as computed from the records is plotted in Profile 1 (here omitted).

From this it appears that the normal annual is 38.48 inches, the lowest annual 31.93 inches, the highest annual 45.09 inches.

That during the period of seventeen years shown on the Profile 4 years were practically normal, 6 years low and 7 years high.

That, excepting in one case, a low or normal year was followed by a high; in the case of exception two low years, 1894 and 1895, occurred in succession.

That the difference between the Normal and Lowest year is from 38.48--31.93=6.55 inches.

Of Run Off.

A portion of precipitation is absorbed by vegetation, another sinks into the ground, a third flows immediately off the surface.

The first aggregates Evaporation, the second accumulates as Ground Storage and gradually feeds into the stream; the sum of the second and third forms the Run-off which is expressed in cubic feet per second of continuous flow.

Evaporation varies throughout the year being greatest during the growing, summer season and least during the replenishing, winter months; it is greater from water than land surfaces; in this latitude the former aggregates forty-eight inches per year, as deter-
555 mined from long period investigations, and the latter from (C. C. Vermeule, C. E. Vol. III, p. 325, State Geologist Report N. J., 1894):

$$E = (15.50 + 0.16\ R)\ (0.05\ T - 1.485)$$

where E is annual Evaporation,
" R " " Precipitation, 38.48 (normal),
" T " " Temperature (mean) 48°,

$$E = 15.50 + (0.16 \times 38.48) \times (0.05 \times 48) - 1.485.$$

and Evaporation is 19.82 inches or 0.515 of Precipitation.

Of the Flow.

The Flow of the Cuyahoga river has been measured by the Government for a continuous period of three years, Sept. 1903-July 1906, at Independence, Ohio, a point controlling a catchment area of 698 square miles, which is about double that herein considered. These measurements are of the daily height of the river stage and some 13 discharge measurements at various stages from which a Rating Table for the flow at all stages has been compiled by the Government.

A true copy of these gaugings and the rating table are attached hereto in Appendix B.

These measurements are the only available authentic flow data and would be conclusive of the actual conditions excepting for the

at the river is paralleled by the Ohio canal and that the flow canal is not included in the measurements. This canal is fed the Cuyahoga river at several points and its flow therefore ates in the catchment area tributary to the locus of the Gov- nt gauging point and should be added to that found by the rements in order to represent the entire run-off from the Cuya- iver Catchment Basin.

e canal flow was estimated by a Board of Government En- s in connection with investigations of canalization from Lake o the Ohio river; a copy of an extract from this report cover- is subject here follows:

> Extract from Report of Board of U. S. Engineers on Proposed Lake Erie-Ohio River Canal, as Quoted in 65th Annual Report of the Ohio Canal Commission 1903, page 67.
>
> *Basis of Expenditure of Water Supply.*
>
> he expenditure of water on canals falls under three heads:
>) That which escapes laterally from the canals, as from evap- on, filtration, leakage at structures, accidental causes and for te use when the water so taken is not returned to the canal.
>) That which is required to maintain the necessary current igh the canal caused by lockage, leakage at gates, and for private when the water abstracted is immediately returned to a lower
>
>) That required to fill the canal prism at the opening of navi- n.
>
> he expenditure under the first head (except for evaporation) assumed by the Government Engineers in their estimates for a l 7 feet in depth by 70 feet in width at water line to be at the of 100 cubic feet per mile per minute, or an average, for the e season, except on the summit levels, where it was assumed to be eet. The loss from exaporation, in addition to the above, was as- ed (Fitzgerald's tables) to be 35.75 inches for the nine months avigation."

he Canal section spoken of in this report exceeds that of the ent Ohio canal, its width being 50 and depth 5 feet, but this not affect the flow materially.

The length of the Canal section which is fed from the Cuyahoga r upstream of the measuring point is about 30 miles, and the mated Canal supply, evaporation excluded, is therefore 100 × = 3,000 minute or 50 second feet, and this volume should be ed to that found by the Government flow measurements as it is lent that the Canal supply is independent of the flow fluctuations he river.

The monthly mean flow during the period covered by the Gov- ment measurements, with Canal allowance added, is given on bles 1 as Run-off and Flow; the Brandywine area is credited with same Run-off ratio.

557 TABLE 1.

Monthly Flow of Cuyahoga River, Ohio.

In Cubic Feet per Second per Square Mile of Watershed, from Stream Measurements made by the U. S. Geological Survey.

Year.	1903.	1904.	1905.	1906.
January	....	2.19	0.88	1.04
	....	766	308	364
February	....	4.52	0.61	0.75
	....	1576	231	262
March	....	4.09	3.0	1.54
	....	1431	1050	539
April	....	2.48	0.99	1.13
	....	968	341	395
May	....	1.51	1.20	0.58
	....	528	420	203
June	....	1.70	0.90	0.37
	....	595	315	129
July	....	0.92	0.84	0.37
	....	322	294	129
August	....	0.54	0.71	....
	....	189	248	....
September	....	0.27	0.83	....
	....	94	290	....
October	0.82	0.29	0.80	....
	287	101	280	....
November	0.64	0.29	0.96	....
	224	101	336	....
December	0.84	0.66	1.23	....
	294	231	430	....
Annual mean	....	1.62	1.08	....
	....	575	378	....

1904 River Flow obstructed by ice gorge during February and March.
Light figures give mean Run-off in cub. sec. ft. per sq. mile.
Heavy figures give mean Flow in cub. sec. ft. from Catchment basin of 350 sq. Miles.

558 It may be proper to state here that the withdrawal of the supply now available for Canal feeding from the Run-off yielded by the 350 square miles area to be utilized by this development will in no wise diminish the needed Canal supply as the remaining 348 square miles catchment area, largely made up of the Little Cuyahoga river and a Canal feeder reservoir located on this latter stream above the city of Akron, Ohio, remain available for such supply. *supply.*

The following Flow data are taken from Table 1.

Year.	Months.	Total.	Monthly. Max.	Monthly. Min.	Mean.	Mean. Run-off.
1903	3	805	294	224	268	0.77
1904	12*	5,399	968	94	450	1.29
1905	12	4,543	1,050	231	378	1.08
1906	7	2,021	539	129	289	0.82
	34	12,768			375	1.07

* Flow of February and March, 1904, is half of that given on Table 1 to compensate for ice gorge conditions.

Of Storage.

ecipitation volume is expressed in inches of Catchment area for ontinuous period of day or month.

ie inch Precipitation on one square mile of territory equals oximately two and one-third million cubic feet and distributed ng one day, from

$$\frac{2.323000}{86400 \text{ (seconds in 24 hours)}} = 26.9 \text{ cub. sec. ft.}$$

in a 28 day month = 0.96 cubic second feet,
in a 30 day month = 0.90 cubic second feet,
in a 31 day month = 0.87 cubic second feet.

One foot of water covering one acre of surface represents a water volume of one acre-foot.

vaporation from water surfaces in this latitude aggregates about y-eight inches and may be taken, for the purpose of this discus-, as a monthly mean of one-third of an acre-foot from one acre

un-off of one cubic second foot from one square mile of Catch-t area for one day aggregates two acre-feet and for

a month of 29 days less evaporation 57.66 acre-feet,
a month of 30 days less evaporation 59.66 acre-feet,
a month of 31 days less evaporation 61.66 acre-feet.

eepage and Leakage from Storage Reservoirs cannot be deter-ned; ten per cent of stored volume is a large allowance in the itory under consideration where material is generally impervious overlying rock ledge. With this deduction the storage volume umulated from a Run-off of one cubic second foot from one mile rea in

a month of 29 days becomes 52 acre-feet,
a month of 30 days becomes 54 acre-feet,
a month of 31 days becomes 57.5 acre-feet.

e volume of one acre-foot, 43560 cubic feet, represents a con-uous 24-hour flow of one-half cubic second foot.

Of Filling Up and Drawing from Storage.

Ex. 1. If a Reservoir of 10,000 acre-feet capacity is to be filled in e month of 30 days from a Catchment area, tributary to the servoir, of 150 square miles, the available Run-off must be from

$$\frac{10000}{54 \times 150} = 1.24 \text{ cubic second feet.}$$

560 Ex. 2. If a Run-off of 0.80 cubic second feet from a Drainage area of 150 square miles is to be stored during a month of 31 days, the required Storage capacity is from

$$\frac{150 \times 57.5}{0.80} = 10781 \text{ acre-feet.}$$

Ex. 3. If a continuous flow of 200 cubic second feet is to be drawn for one month of 30 days the available Storage must be from

$$54 \times 200 = 10800 \text{ acre-feet.}$$

Of the Flow Argument.

This argument from which conclusions as to the available power flow are drawn accepts the feasibility of utilizing practically the entire annual Run-off by storing the available surplus of the high and replenishing the deficient Run-off whether for the period of a day or a month. In this connection no valuable evidence can be secured from the investigation of the daily or monthly fluctuations, those presented by the year only are essential; nor need the discussion concern itself with the years of high flow but is confined to those of normal and low; and lastly it should be principally of that period for which the facts regarding flow conditions are known.

The characteristics of the normal years 1904 and 1905 covered by the Government measurements, and of the lowest Precipitation year of record (1900) are analyzed on Table 2.

561 TABLE 2.

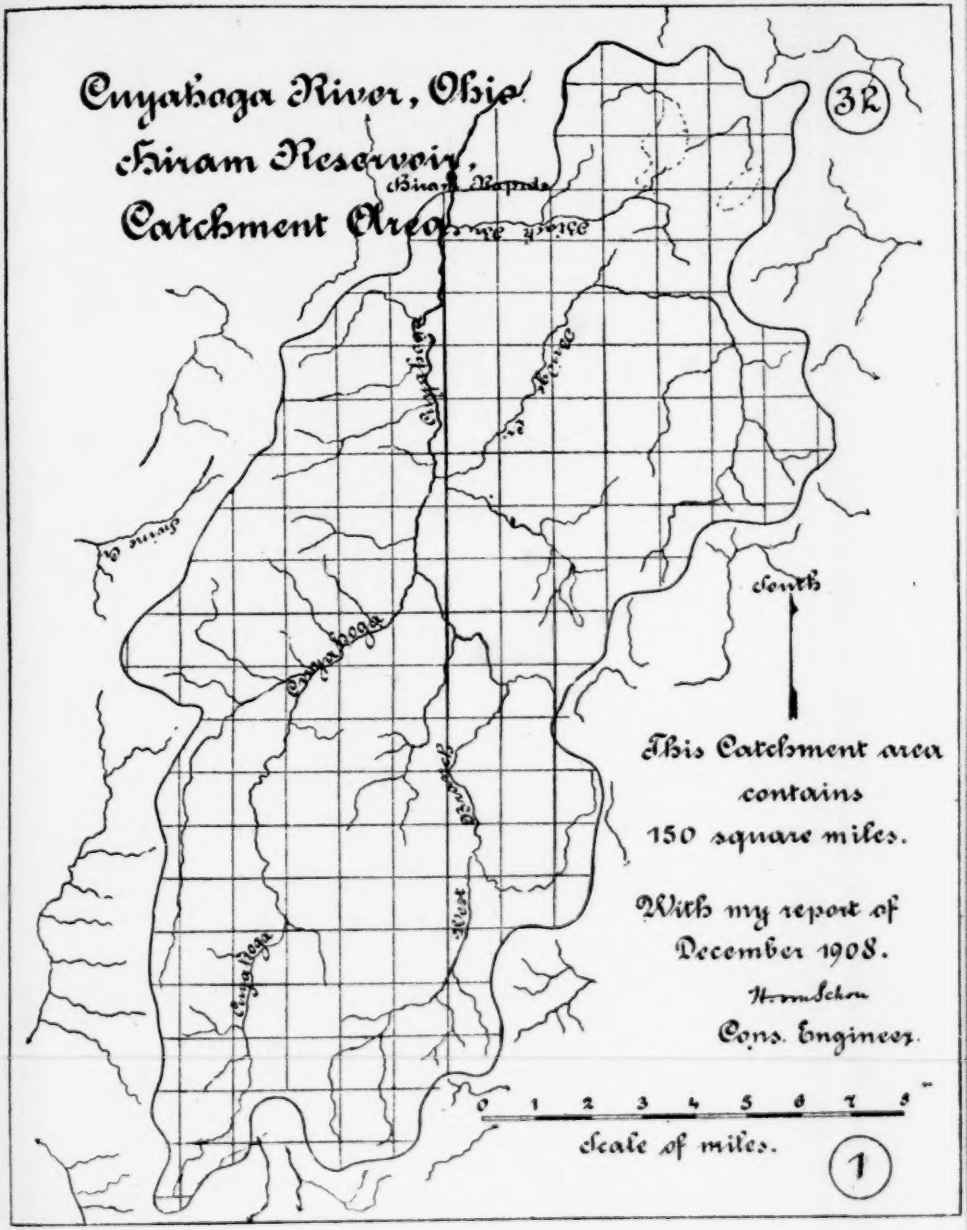
Analysis of Precipitation, Evaporation and Run-off for Normal and Low Years.

1904.	Prec.	Evap.	
Dec. '03-May '04.....	23-51	3.55	Replenishing season.
June-Nov. '04.....	16-00	20.30	Growing season.
	39-51	23.85	

Run-off 15.66″ = 1.122 c. sec. ft.
Flow from above 392 cubic second feet.
Flow from measurements 575 cubic second feet.

1905.		
Dec. '04-May '05.....	16.61	3.15
June-Nov. '05.....	24.41	22.65
	41.02	25.80

Run-off 15.22 = 1.1121 c. sec. ft.
Flow from above 389 cubic second feet.
Flow from measurements 378 cubic second feet.



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No 3142
Cuyahoga River Power Co.
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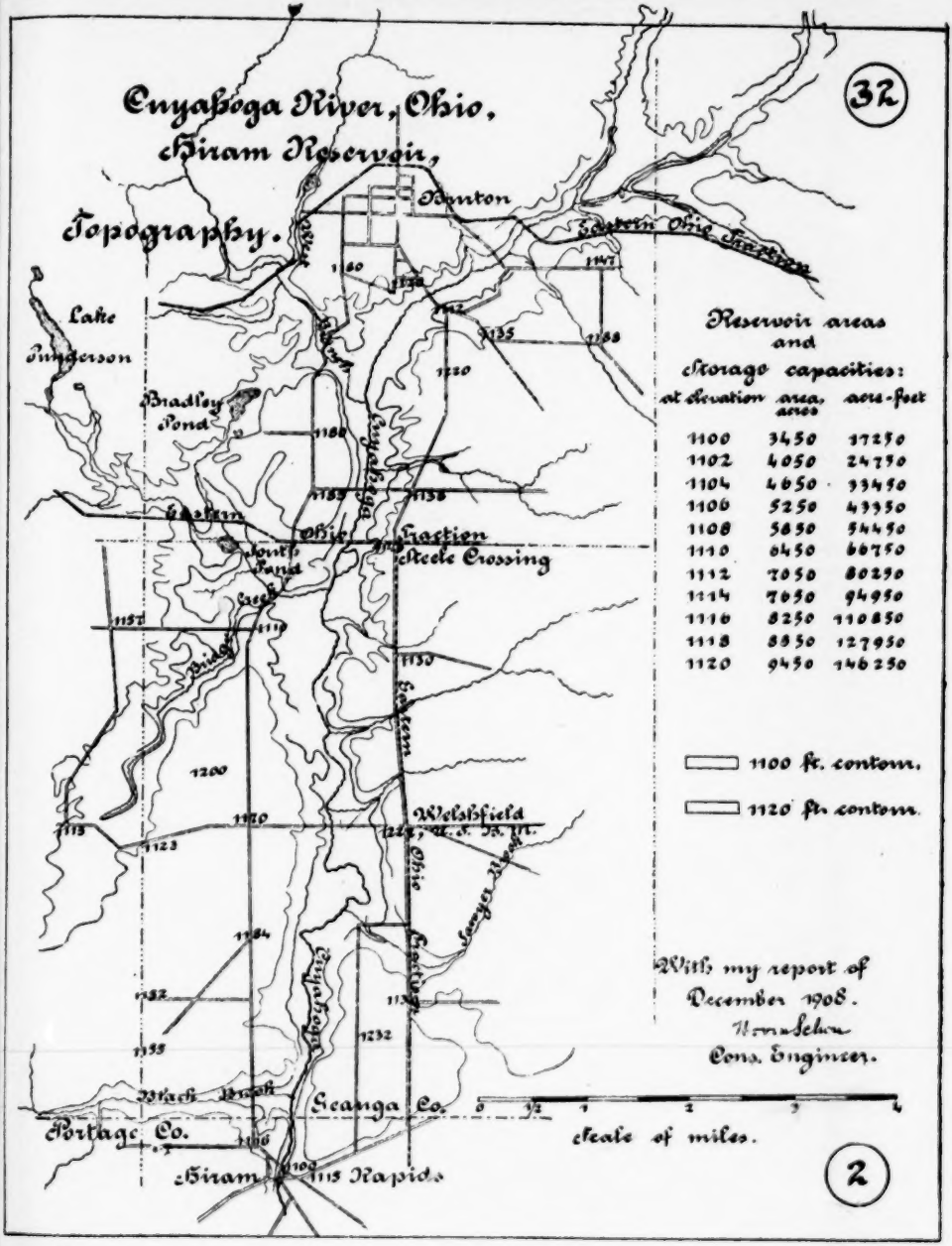


No. 32.

Cuyahoga River Power Co.

1900.		
Dec. '99-May '00.....	14.34	3.00
June-Nov. '00.....	18.99	21.00
	33.33	24.00

Run-off $9.33'' = 0.687$ c. sec. ft.
Flow 240 cubic second feet.

Evaporation during replenishing season $= (4.30 + 0.12\ R) \times$
).05 T-1.48).
Evaporation during growing season $= (11.30 + 0.20\ R) \times$
).05 T-1.48).
Temperature during replenishing season was 39° appr.
Temperature during growing season was 58° appr.

(Here follow diagrams marked pages 562 and 563.)

564 From Table 2 appears:

First, that Run-off is not a fixed ratio of Precipitation cause of the fluctuating values of Evaporation during the season, ing much greater while demands of vegetation are met; therefore two years of equal annual Precipitation the monthly distributi may be such that the Run-off differs considerably.

This is well illustrated by the two normal years 1904 and 19 Precipitation in 1904 is one and a half inch greater but Run-off practically as in 1905.

Second, that the flow measurements for 1904 are of no value sin they give 50 per cent more flow though Precipitation was less. T is fully accounted for by the ice gorge in February and March wh maintained a high river stage at the measuring point above gorge but not a corresponding flow.

Third, that the measurement results for 1905, with Canal fl added, agree closely with Evaporation deductions and may be cepted as substantially correct.

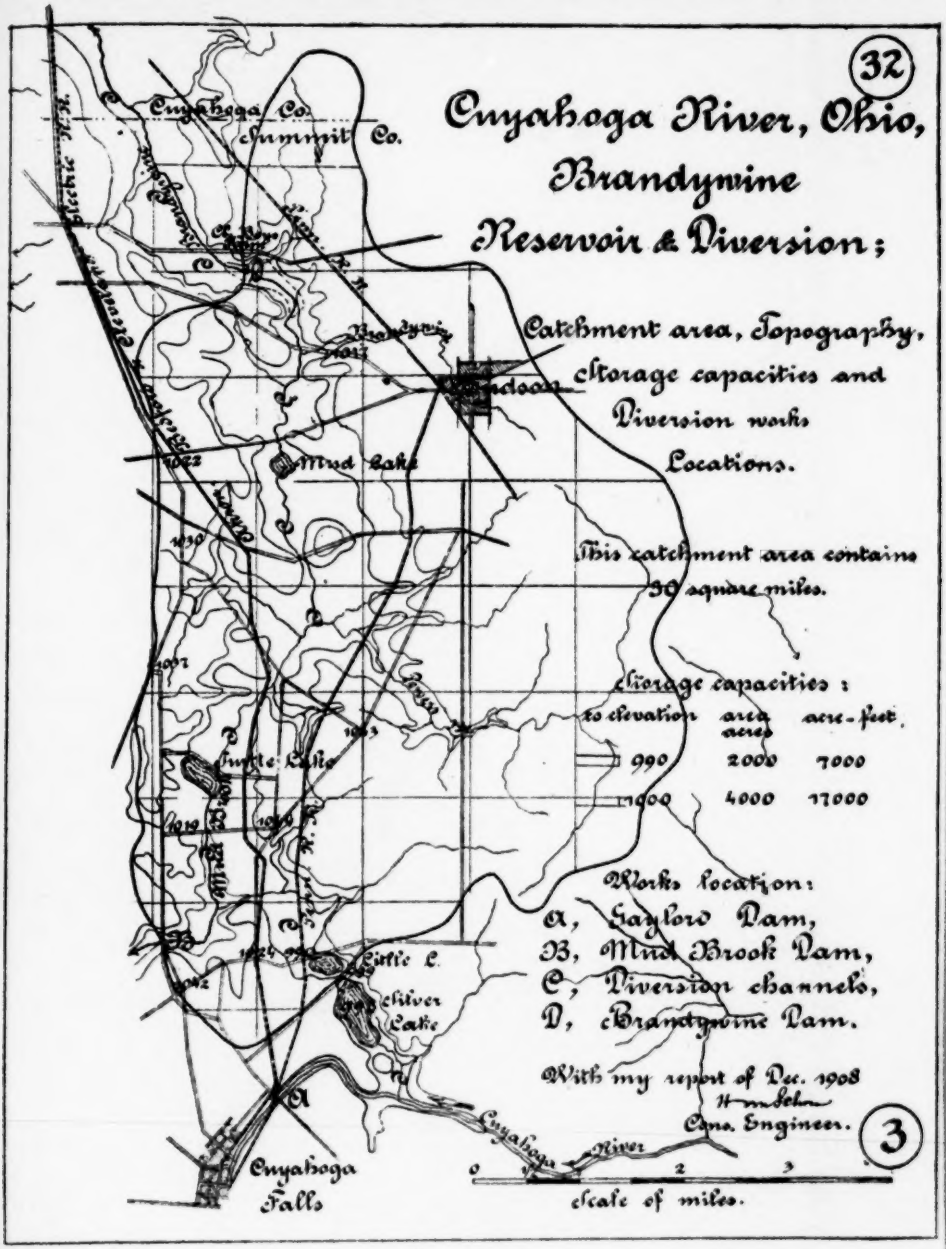
Fourth, that the Normal year mean flow is 378 cubic second fe
the Lowest year mean flow is 240 cubic second fe
the mean of these two is 309 cubic second feet.

Of Available Storage.

Plan 1 shows the area draining into the upper reach of t Cuyahoga river above the settlement of Hiram Springs, it conta one hundred and fifty square miles.

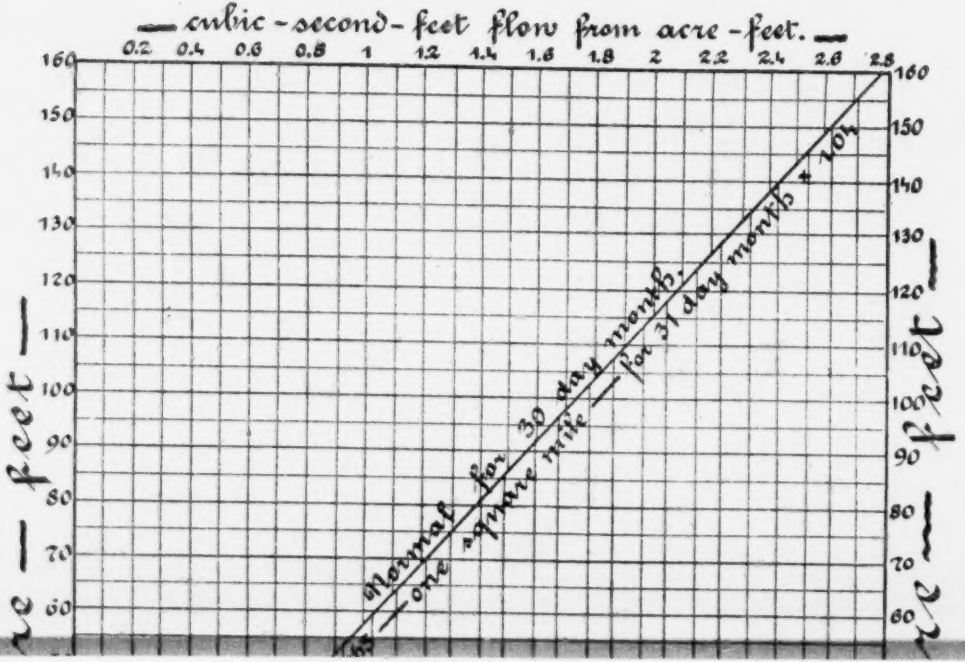
From Hiram Springs to the town of Burton northerly, a dista of eight miles, a natural basin is formed by a depression from to 2 miles in width; the river passes through at a general elevati of about 1090 feet above sea level, the basin surface rises sligh above this and is generally flat, but it is surrounded by a range hills rising to elevation of 1,200 feet and higher with no ou excepting where the Cuyahoga leaves it at its Southern extrem and at this point the hills approach each other within 500 feet elevation of 1,120 feet.

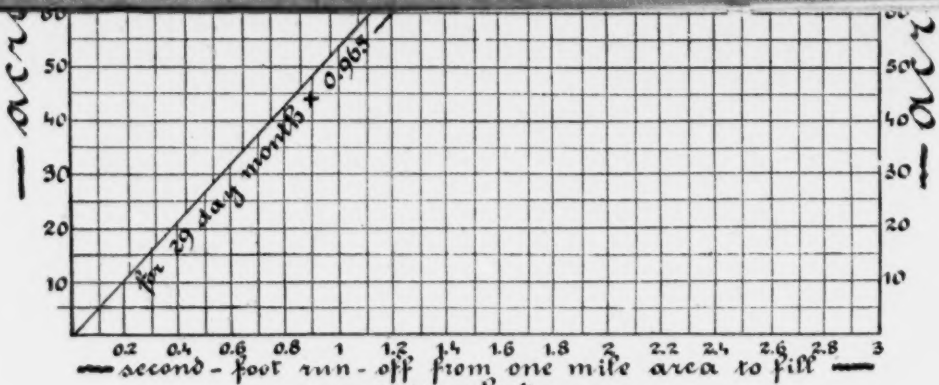
(Here follows diagram marked page 565.)



No. 312.
Cuyahoga River Power Co
D 565.

Storage Diagram.


— cubic-second-feet flow from acre-feet. —
0.2 0.4 0.6 0.8 1 1.2 1.4 1.6 1.8 2 2.2 2.4 2.6 2.8
160 150 140 130 120 110 100 90 80 70 60
— feet —
Normal for 30 day months.
— one square mile —
for 31 day months = 1.04


— acre
50
40
30
20
10
for 29 day months x 0.965
0.2 0.4 0.6 0.8 1 1.2 1.4 1.6 1.8 2 2.2 2.4 2.6 2.8 3
— second - foot run - off from one mile area to fill —
— acre - feet. —

Computed by B. von Schon,
Cons. Engineer, Detroit, Mich.

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Cuyahoga River Power Co
v.
Northern Realty Co
} D 567.

66 Plan 2 is of this natural Reservoir site giving its topography as taken from U. S. plans from which the Storage capacities, t the different elevations, appearing thereon have been computed. The perfection of this natural reservoir cannot be exaggerated nd it may be adapted to the needs of water storage for the project erein dealt with with a degree of completeness depending only pon operation details.

Plan 3 is of a second natural Reservoir site, from U. S. Govern- ient plans, the valley of Mud Brook and the Brandywine, the first tributary of the Cuyahoga river emptying into it below the town f Cuyahoga Falls, the second also of the Cuyahoga Catchment asin but empties into the river some fifteen miles downstream of he City of Akron. This valley runs generally North and South, Iud Brook passing out of its Southern and the Brandywine out of he Northern end, both of them having a natural connection near he center, though each has a perceptible fall in the direction of its estination. These water courses leave the basin at about elevation 80 feet above the sea level, the basin rising to 990 near the center, nd is surrounded by ridges rising to elevation 1,020 feet and igher with no outlets excepting by these two streams. The Storage apacities of this, the Brandywine Reservoir, are not large, but epresent an available factor in the project.

This Reservoir receives the run-off of the entire 350 square miles f catchment basin.

Of Available Power Flow.

With the conclusions drawn from the Flow argument, the facts nown of the normal and low year, and of available storage apacities, the final determination of the available Power Flow is a ogical sequence.

The Storage Diagram gives equivalents of Run-off to Storage fill s well as of Flow supply and Storage volumes, and from this and he flow data for any year a Storage Program can readily be pre- ared which will conserve the entire available annual flow and istribute it at will. Table 3 gives such a program for the normal ear 1905 with the data of flow and available storage capacities, eretofore quoted, as a foundation.

(Here follows diagram marked p. 567.)

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TABLE 3.

Storage Program for 1905.

Flow Regulated to 300 cub. sec. ft.; Hiram Reservoir Filed to elev. 1110 with 66750 A. F.

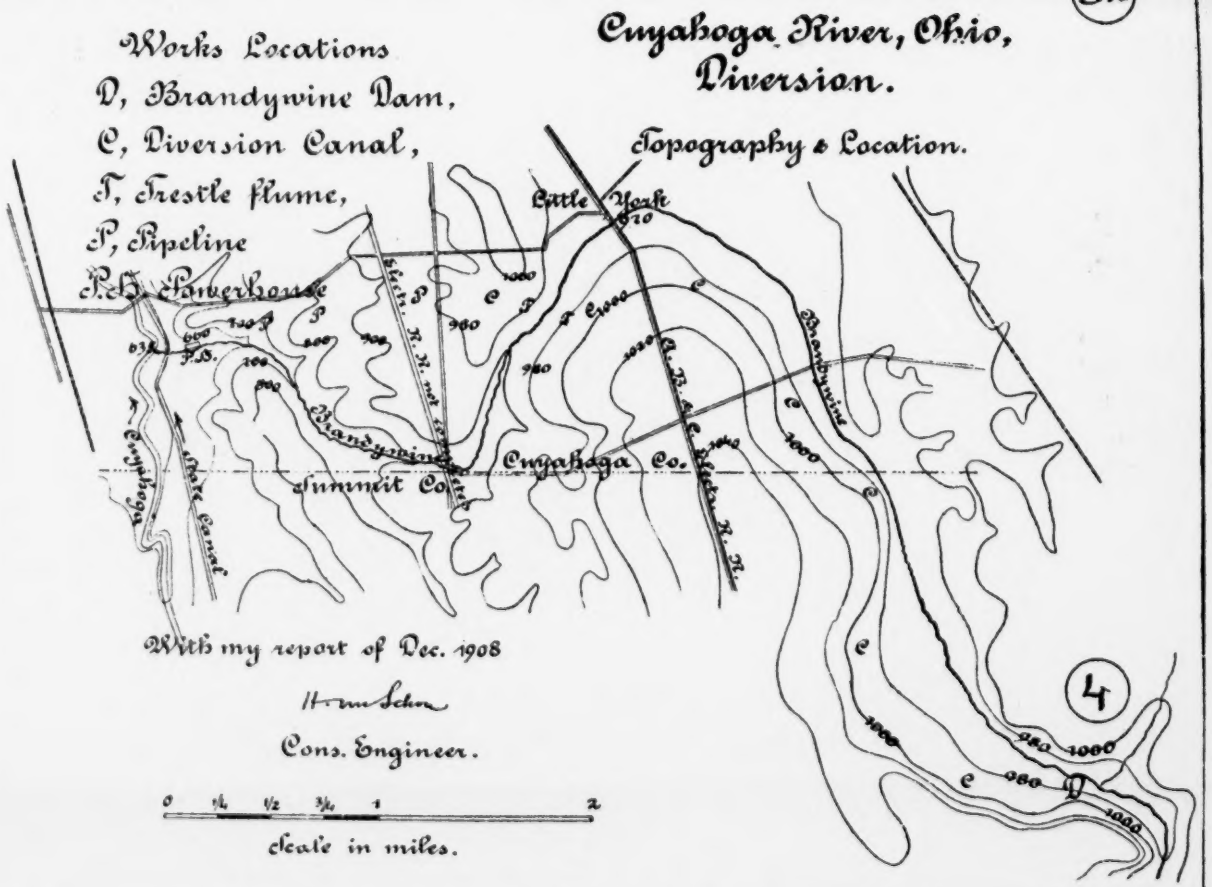
1	2	3	4	5	6	7	9	8	10
Month.	R. O.	Flow.	Surpl.	Def.	Store A. F.	From R. O.	Draw A. F.	A. F.	In store to elev.
January	0.88	308	8	none	480	0.1	none	67,230	1,110
February	0.61	231	none	69	none	...	4,180	63,050	1,109
March	3.00	1,050	750	none	24,900	3.0	none	87,950	1,113(1)
April	0.99	341	41	none	2,370	0.3	none	90,320	1,114(2)
May	1.20	420	120	none	7,100	0.9	none	97,420	1,114(3)
June	0.90	315	15	none	858	0.1	none	98,278	1,114(4)
July	0.84	294	none	6	none	...	340	97,938	1,114
August	0.71	248	none	52	none	...	3,082	94,856	1,114
September	0.83	290	none	10	none	...	570	94,286	1,114
October	0.80	280	none	20	none	...	1,200	93,086	1,114
November	0.96	336	36	none	2,050	0.25	none	95,136	1,114
December	1.23	430	130	none	7,700	...	none	102,836	1,115
					45,458		9,372		
						Bal. stored,	36,086		

(1) Surplus is 44,930 A. F. but R. O. of 30.0 sec. ft. fr. Hiram Catchment basin yields only 24,000 A. F. 20,930 A. F. may be stored in Brandywine.

(2) R O. of 0.3 sec. ft. from Hiram Drainage accumulates Surplus.
R. O. of 0.99 sec. ft. from remaining area of 200 sq. miles, plus R. O. of 0.66 from Hiram area furnishes 300 sec. ft.

(3 and 4) Same as No. 2.

R. O. is run-off; Def., deficiency; A. F. is acre-feet; elevations refer to Plan 2.



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Cuyahoga River Power Co
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FROM H. VON SCHON, CONSULTING HYDRO-ELECTRIC ENGINEER, DETROIT, MICH.

569 From this it appears that when starting with storage filled to elevation 1,110 (67,230 acre feet) the flow during 1905 could have been regulated to a constant of 300 cu. sec. ft. leaving at the end of the year over one hundred thousand acre feet stored, an excess of 36,000 over that at the beginning.

Supposing the next year was like that of 1900, the lowest of record, with a mean monthly flow of 240 cub. sec. ft. it would require a storage supply of 60 cub. sec. ft. or 41,000 acre-feet for the year and even then the Hiram Reservoir would still contain 60,000 acre feet; this program would therefore regulate the flow of one normal followed by one or two lowest years and still contain 20,000 acre feet. It appears, therefore, to be entirely feasible to restrict storage to elevation of 1,112 ft. and maintain a constant flow of three hundred cubic second feet without calling into requisition any of the available storage in the Brandywine Reservoir.

Of Flow Conclusions.

Before leaving this subject, and in view of the great importance of the conclusions drawn as regards the commercial merit of this project, I wish to emphasize that the argument is based solely upon known facts, that the conclusions may err only on the side of safety. The 1905 flow is evidenced by the physical measurements and the deductions from evaporation values, the addition to Government totals for Canal flow is fully justified by the findings of the official board; the Reservoir existence is a substantial fact, its capacity is based upon the topography of the Government maps; excess allowances are made for evaporation losses from storage. From all these the result is evolved without the necessity of making a single estimate or assumption.

Of the Fall.

The topographical details of the Government maps are conclusive as to this topic. The outlet of the Brandywine Reservoir site, whence the water is to be diverted for this development, as will appear in greater detail under Development Program, is at elevation

(Here follows diagram marked page 570.)

571 985 ft. and can be readily raised to 990 feet as appears fro
the topography on Plan 3; this constitutes the Upper leve
The elevation of the Cuyahoga river at the mouth of the Brandy
wine, which is the point at which the water is to be returned, is
elevation 635 ft., as given on Government plans and verified b
me by a line of levels from the Government Bench mark on th
abutment of the Cuyahoga river bridge at New Boston to the mout
of the Brandywine: this is the objective Lower Level, and th
Physical Fall is from 990-635 = 355 feet.

This will be subject to some losses hereinafter noted.

Of the Development Program.

Item 1. A Reservoir Dam is to be constructed at the South en
of the Hiram Reservoir site.

Item 2. Thence the water is to be taken down its natural chann
to the town of Cuyahoga Falls where a Dam is to be erected belo
the Gaylord bridge at the Northern boundary of Cuyahoga Falls
this is to be raised to elevation 993 ft. Its location is marked o
Plan 3 by the letter "A."

Item 3. A channel is to be cut from Cuyahoga river, about
miles above the Gaylord Dam, to connect with Silver Lake, whos
surface elevation is now about 993 feet.

Item 4. Silver and Little Lakes are to be connected by a channe

Item 5. A canal is to be cut from Little Lake to the Mud Broo
channel.

Item 6. Mud Brook is to be closed by a Dam "B" above Iro
bridge crossing, also rising to elevation of 993 feet.

Item 7. Mud Brook and Brandywine channels are to be widene
to the North end of the Brandywine basin; considerable of th
work is now being done by Summit County for the purpose of crea
ing more perfect drainage for the adjacent bottom lands, and i
this connection the cost of dredging and trenching in that countr
is readily established and is referred to under Estimates.

Item 8. Brandywine basin is to be closed by a Dam "D" to b
located near the Cleveland Boys' Home Farm, rising to the sam
elevation of 993 ft.

572 Item 9. A canal is to be cut from the Brandywine Da
following the 995-foot contour, passing Little York bridg
on the south and terminating at the Brandywine defile about a thi
of a mile West of Little York.

Item 10. A Flume is to be constructed across the Brandywin
gorge.

Item 11. A Canal is to be cut from the Brandywine ravine ha
a mile westerly to the first North and South road West of Litt
York and there to terminate in a Bulkhead.

Item 12. A pipe line is to be laid from this canal Bulkhead dow
the incline to a point on the Brandywine five hundred feet east
the State Canal.

Item 13. A Power Station is to be erected at this point whe
the pipe line terminates.

Item 14. The Brandywine is to be widened and deepened from this point to its junction with the Cuyahoga river.

Item 15. The present culvert by which the Brandywine passes under the State Canal is to be enlarged.

Item 16. A Transmission line is to be constructed to the market point.

Of the Structural Types.

The Dam Structures estimated on are of the Concrete-steel Reservoir-bulkhead types; the conditions are most favorable for this class of structure, all foundations going to Rock ledge which is near the surface. These are absolutely permanent, will require no repairs and do not exceed the cost of any other. All of these are to be provided with steel plate sluice gates operated by hand power.

Canals are of a section to pass the flow at a velocity not exceeding one and a half feet per second, side slopes are two in one, the prism is unlined as the imperviousness of the material guarantees against undue leakage.

The Flume across the Brandywine gorge is a concrete-steel conduit supported on steel columns.

The Canal terminal bulkhead is of concrete-steel with valve gates.

The Pipe line is of steel-plate riveted pipe bedded in trench.

The volume to be conducted aggregates 300 cu. second feet.

573 The flow characteristics of various size pipes are shown in:

Table 4—Pipe Characteristics.

Diameter in inches.	Flow capacity in cub. sec. ft.	Velocity in ft. per sec.	Friction head in feet per 1,000 ft. pipe.
60	154.7	7.88	4.19
66	154.7	6.51	2.62
72	154.7	5.47	1.72
78	150	4.52	1.09

From the above it appears that the 78-inch pipe is the most recommendable for this case; two such lines are required. The loss of head due to friction being for total length of 6,500 feet from $6{,}500 \times 1.09 = 7.08$ feet.

Wood stave pipes are the only other economical conduit which could be utilized for a distance of 4,000 feet lying within the pressure head limit of 200 feet, which is the safe capacity of this type. The cost of these would, however, considerably exceed that of steel plate pipes.

The Power Station is a concrete-steel structure with steel roof; of ample dimensions to install the equipment and provide for convenient operations. It is founded on rock ledge and is a fire-proof structure.

The State Canal Culvert is of concrete-steel.

The Transmission line is of timber poles set 120 feet centers.

Of the Estimates.

The Estimates are based upon the following unit values for material and labor:

Cement, Portland, delivered, per barrel	$1.25
Dredging (no rock), per cubic yard	.12
McGowan Bros., of Akron, O., are now executing contract in that section at 10c.	
Excavating Rock, per cubic yard	.65
Now being done for County at 58c.	
574 Excavating Earth, per cubic yard	.15
John O'Neil, of Akron, O., is now executing contract in that section at 13½c.	
Filling material in place, per cubic yard	.15
With power diggers from adjacent borrow pits.	
Gravel, delivered	.50
Labor, common	1.75
Labor, skilled	3.50
Lumber for forming p. 1,000 ft. b. m. delivered	30.00
Sand, per cub. yard, delivered	0.50
Steel, re-enforcing, delivered, per lb	0.03
Steel, structural, erected and painted, per ton	120.00
Team work, per day	3.75
Timber for form frames, false works, p. 1,000 f. b. m.	25.00

Equipment:

Gates, steel hoist, with operating gear, per square foot area	100.00
Pipe, steel plate riveted per foot length, 15c. p. 100 weight for freight and delivery from quotation by the Wm. B. Pollock Co., of Youngstown, O., Dec. 15, 1908:	
78″ diameter ½″ plate per lin. foot	11.25
78″ diameter 5-16″ plate per lin. foot	7.65
78″ diameter ¼″ plate per lin. foot	6.85
Relief Valves, old quotation, delivered	1,500.00
Hydraulic Turbines with Governors, Pressure Regulators and Draft Tubes, and Electric Generators with Exciters, all covered by proposal of the Allis-Chalmers Company of Dec. 17, '08, f. o. b. cars Milwaukee	65,900.00
Freight and delivery on same at 15c. p. 100, total wgt. 455,000 lbs.	685.00
Transmission line, per mile	3,000.00
Transformers (old quotation) p. kilowatt	5.00

Concrete manufactured and placed, based upon quoted unit prices and the employment of batch mixers and power conveyors.

75 X Concrete—Monolithic, without forming 1-3-6:

ne barrel cement	$1.25	
½ yard sand	0.25	
yard gravel	0.50	
lixing	0.35	
Conveying	0.25	
Placing and ramming	0.25	2.85
Profit of 15%		.43
		$3.28

X F Concrete—Monolithic, formed, 1-3-6:

Add to X Concrete	$2.85	
Placing	0.25	
Forming	1.00	4.10
15% Profit		0.62
		$4.72

X X Concrete—Monolithic, formed, 1-2-4:

One and a half barrel cement	$1.88	
½ yard sand	0.25	
1 yard gravel	0.50	
Mixing	0.35	
Conveying	0.25	
Placing and ramming	0.75	
Forming	1.00	4.98
15% Profit		0.75
		$5.73

X X S Concrete—Formed, 1-2-4 re-enforced with steel rods:

Add to X X Concrete	$4.98	
Placing steel rods	1.00	
Placing and ramming	0.25	6.23
15% Profit		.94
		$7.17

576 *Estimates for Roads and Bridges.*

Item 1. Hiram Reservoir:

Raising seven highway crossings.
20,000 feet of highway,
15 ft. wide mean height 8 feet, slopes 1½: 1, mean filling quantity 8 cub. yds.,
Fill of 160,000 cub. yds. at 0.15 ..... $24,000.00

Item 2. Raising two electric road beds:	
12,000 feet, 10 ft. wide, mean height 8 ft., mean filling quantity 7 cub. yds.,	
Fill of 84,000 cub. yds. at 0.15	12,600.00
Ballasting with gravel at 0.50 p. c. y. 5 ft. wide, 3" deep, 15,000 cub. yds	7,500.00
Item 3. Raising 14 bridges for mean height 8 ft.:	
Five crossing Cuyahoga river,	
Nine crossing tributary branches,	
Abutments 10′ wide, 10′ high, 3 ft. Concr., 22 cub. yds. per bridge,	
308 cub. yds. X F Concr. at 4.72	1,454.00
Excavation, 20 cub. yds. per bridge, 280 cub. yds. at 25c.	70.00
False works for raising bridges at 10.00	140.00
Item 4. Taking up and re-laying 12,000 ft. of electric road tracks at 2,500.00 per mile	5,625.00
Item 5. Taking down and replacing overhead construction, trolley and feed wires, 2¼ miles, at 1,500.00 per mile	3,375.00
Item 6. Brandywine and Terminal Diversion:	
Erecting 8 bridges crossing canals,	
One for steam railroad,	
Two for electric roads,	
Five for highways,	
577 Abutments and excavation as per Item 3, Per bridge, at 119.00	952.00
Steel plate girder bridges 10′ w. 30′ l. at 1,500.00, erected and painted	12,000.00
Item 7. Moving "Steele Crossing" Cemetery	1,000.00
Total Roads and Bridges	$68,716.00

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Estimates for Development at Cuyahoga Falls, Ohio, on Cuyahoga River, Based on Surveys Made by H. von Schon, Cons. Engr.

Hiram Reservoir Dam and Embankments.

Item.	Constructions and operations.	Dimensions. H.	Dimensions. L.	Dimensions. W.	Quantity. Number.	Quantity. Unit.	Cost.	Amount.
1.	Controlling flow during construction	.....	.....	.....	.....	.....	.....	$1,900.00
2.	Preparing river bed and banks	.....	.....	.....	.....	.....	.....	270.00
3.	Foundation on rock	.....	.....	.....	.....	.....	.....	.....
4.	Dam: Monolithic Concrete Spillway type	21	100	.....	.....	.....	.....	.....
	Dam contains 900 cub. yds. XX concrete	.....	.....	.....	900	c. ys.	$5.73	5,157.00
5.	Abutments: Concrete-steel buttressed type	.....	.....	.....	.....	.....	.....	.....
	Abutments contain 150 cubic yds. XXS concrete	.....	.....	.....	150	c. ys.	7.17	1,076.00
	Abutments contain 7,000 lbs. steel	.....	.....	.....	7,000	lbs.	.03	210.00
6.	Bulkheads: Concrete-steel	25/0	450	.....	.....	.....	.....	.....
	Concrete, X	.....	.....	.....	455	c. ys.	3.28	1,493.00
	Concrete, XXS	.....	.....	.....	393	c. ys.	7.17	2,818.00
	Steel, re-enforcing	.....	.....	.....	90,000	lbs.	.03	2,700.00
7.	Sluices and Gates: Two 8 x 10 sluice gates in Bulkhead	.....	.....	.....	.....	.....	.....	2,200.00
	Total	.....	.....	.....	.....	.....	.....	$17,954.00

578 *Estimates for Development at Cuyahoga Falls, Ohio, on Cuyahoga River, Based on Surveys Made by H. von Schon, Cons. Engr.*

Gaylord Bridge Dam.

Item.	Constructions and operations.	Dimensions.			Quantity.		Cost.	Amount.
		H.	L.	W.	Number.	Unit.		
1.	Controlling flow during construction	.....	.....	.....	.....	.....	.....	$4,100.00
2.	Preparing river bed and banks	.....	.....	.....	.....	.....	.....	220.00
3.	Foundation on rock ledge	.....	.....	.....	.....	.....	.....	.....
	Foundation concrete, none	.....	.....	.....	.....	.....	.....	.....
4.	Dam: Monolithic Concrete type	10	100	.....	.....	.....	.....	.....
	Dam contains 315 cub. yds. XX concrete	.....	.....	.....	315	c. ys.	5.73	1,805.00
5.	Abutments: Concrete-steel type	.....	.....	.....	.....	.....	.....	.....
	Abutments contain 38 cub. yds. XXS concrete	.....	.....	.....	38	c. ys.	7.17	273.00
	Abutments contain 2,000 lbs. steel	.....	.....	.....	2,000	c. ys.	.03	60.00
6.	Embankments: None	.....	.....	.....	.....	.....	.....	.....
	Total	.....	.....	.....	.....	.....	.....	$6,458.00

Estimates for Development at Cuyahoga Falls, Ohio, on Cuyahoga River, Based on Surveys Made by H. von Schon, Cons. Engr.

Mud Brook Dam and Embankments.

Item.	Constructions and operations.	Dimensions. H.	Dimensions. L.	Dimensions. W.	Quantity. Number.	Quantity. Unit.	Cost.	Amount.
1.	Controlling flow during construction	.....	.....	.....	.....	.....	.....	$1,800.00
2.	Preparing river bed and banks	.....	.....	.....	.....	.....	.....	240.00
32.	Foundation on rock	.....	.....	.....	.....	.....	.....	.....
4.	Dam: Monolithic Concrete Spillway type	20	50	.....	.....	.....	.....	.....
	Dam contains 400 cub. yds. XX concrete	.....	.....	.....	400	c. ys.	5.73	2,052.00
5.	Abutments: Concrete-steel type	.....	.....	.....	.....	.....	.....	.....
	Abutments contain 100 cub. yds. XXS concrete	.....	.....	.....	100	c. ys.	7.17	717.00
	Abutments contain 4,000 lbs. steel	.....	.....	.....	4,000	lbs.	.03	120.00
6.	Concrete-steel Bulkhead	20/0	1075	.....	.....	.....	.....	.....
	Concrete, X	.....	.....	.....	907	c. ys.	3.28	2,975.00
	Concrete, XXS	.....	.....	.....	920	c. ys.	7.17	6.597.00
	Steel, re-enforcing	.....	.....	.....	190,000	lbs.	.03	5,700.00
7.	Gates: Two 8 x 10 sluices in Bulkhead	.....	.....	.....	.....	.....	.....	2,200.00
	Total	.....	.....	.....	.....	.....	.....	$22,411.00

579 *Estimates for Development at Cuyahoga Falls, Ohio, on Cuyahoga River, Based on Surveys Made by H. von Schon, Cons. Engr.*

Brandywine Dam and Embankments.

Item.	Constructions and operations.	Dimensions. H.	L.	W.	Quantity. Number.	Unit.	Cost.	Amount.
1.	Controlling flow during construction	.....	.....	.....	.....	.....	.....	$1,600.00
2.	Preparing river bed and banks	.....	.....	.....	.....	.....	.....	900.00
3.	Foundation on rock	.....	.....	.....	.....	.....	.....	.....
4.	Dam: Reservoir Concrete-steel Bulkhead, Item 6	.....	.....	.....	.....	.....	.....	.....
5.	Abutments: None required	.....	.....	.....	.....	.....	.....	.....
6.	Concrete steel Bulkhead	20/0	1400	.....	.....	.....	.....	.....
	Concrete, X	.....	.....	.....	780	c. ys.	$3.28	2,560.00
	Concrete, XXS	.....	.....	.....	785	c. ys.	7.17	5,630.00
	Steel, re-enforcing	.....	.....	.....	186,000	lbs.	.03	5,580.00
7.	Gates: Four 8 x 10 sluices in Bulkhead	.....	.....	.....	.....	.....	.....	4,400.00
	Total	.....	.....	.....	.....	.....	.....	$20,670.00

Estimates for Development at Cuyahoga Falls, Ohio, on Cuyahoga River. Based on Surveys Made by H. von Schon, Cons. Engr.

Canal Pipe-line.

Item.	Constructions.	Dimensions. H.	Dimensions. L.	Dimensions. W.	Quantity. Number.	Quantity. Unit.	Cost.	Amount.
1.	Channel: Section 200 ft. sq. slopes 2:1	.....	.....	.....	.....	.....	.....	.....
	Rock Excavation: 20% of whole	.....	.....	.....	44,040	c. ys.	$0.65	$28,624.00
	Earth Dredging: (See details below)	.....	.....	.....	176,160	c. ys.	.12	21,139.00
2.	Head Gates: In Dam Estimates	.....	.....	.....	.....	.....	.....	.....
3.	Canal Section 200 sq. ft. slopes 2:1	.....	.....	.....	.....	.....	.....	.....
	Rock Excavation: 20% of total	.....	.....	.....	71,060	c. ys.	.65	46,189.00
	Earth Excavation: (See details below)	.....	.....	.....	284,240	c. ys.	.15	42,636.00
4.	Pipe Line: Details below	.....	.....	.....	.....	.....	.....	.....
	Surfacing: Excavating 4'd—30-20	.....	.....	.....	26,000	c. ys.	.15	3,900.00
	Pipe Supports: Pipe in trench	.....	.....	.....	.....	.....	.....	.....
	Pipe: (Details below)	.....	.....	.....	.....	.....	.....	113,930.00
	Pipe laying, including field riveting, bedding and painting	.....	.....	.....	13,000	1. ft.	2.00	26,000.00
5.	Forebay: Concrete-steel "U" Bulkhead	15	70	.....	.....	.....	.....	.....
	Concrete, X	.....	.....	.....	60	c. ys.	3.28	197.00
	Concrete, XXS	.....	.....	.....	80	c. ys.	7.17	574.00
	Steel, re-enforced	.....	.....	.....	6,000	lbs.	.03	180.00
7.	Two Gate Valves in Bulkhead	78"	.....	.....	.....	.....	.....	3,000.00
8.	Bridges: See Roads and Bridges Estimate	.....	.....	.....	.....	.....	.....	.....
	Total	.....	.....	.....	.....	.....	.....	$286,369.00

Channel and canal sections.	Length. feet.	Dredging. cub. yds.	Excavating
Cuyahoga River-Silver Lake....	2,750	16,200	
Silver to Little Lake.....	800		20,800
Little Lake to Mud Brook.....	4,000		144,000
Mud Brook and Brandywine...	34,000	204,000	
Brandywine Dam to Trestle....	23,000		172,500
Trestle Crossing to Pipe Intake.	2,400		18,000
		220,200	353,300

Channel dredging quantity is 0.8 of full sections; rock is 20% of total.

Pipe line.	Length.	Thickness of plate.	
100 ft. head	2,200	¼ inch per ft.....	$6.85
200 ft. head	1,800	5-16 inch per ft.....	7.65
300 ft. head	1,700	½ inch per ft.....	11.25
350 ft. head	800	½ inch per ft.....	11.25

Estimates for Development at Cuyahoga Falls, Ohio, on Cuyahoga River, Based on Surveys Made by H. von Schon, Cons. Engr.

Flume Crossing Brandywine.

Item.	Constructions.	Dimensions. H.	L.	W.	Quantity. Number.	Unit.	Cost.	Amount.
1.	Flume: Section 150 sq. ft. (see below for details)	35/0	1200	.....	500			
	100 Footing, Concrete X	.....	.....	.....	2,700	c. ys.	$3.28	$1.640.00
	Conduit Concrete XXS	.....	.....	.....	75	c. ys.	7.17	19,360.00
	Struct. Steel	.....	.....	.....	.....	tons	120.00	9,000.00
	Total	.....	.....	.....	.....	.....	.....	$28,524.00

581 Trestle Flume Across Brandywine Defile.

Concrete steel conduit of 150 sq. ft. flow section supported by steel columns standing on concrete footings.

Trestle bents, 10 ft. c. s.
Trestle 500 feet long.
Conduit 1,200 feet long.
Columns of 8″ channel and plate at 40 lb. per l. ft.
Conduit Floor beams at 40 lb. per l. ft.
Conduit Roof ties 8″ channels 1.5 ft.

Approximate steel weight of Bent 3,000 lbs.

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Estimates for Development at Cuyahoga Falls, Ohio, on Cuyahoga River, Based on Surveys Made by H. von Schon, Cons. Engr.

Power Station.

Item.	Constructions.	Dimensions. H.	Dimensions. L.	Dimensions. W.	Quantity. Number.	Quantity. Unit.	Cost.	Amount.
1.	Foundation on Rock:							
	Rock excavation	10	75	50	1,400	c. ys.	$0.65	$910.00
	Foundation concrete, X	2	75	50	280	c. ys.	3.28	819.00
2.	Substructure:							
	End walls, concrete, XF, two	6	50	5	112	c. ys.	4.72	529.00
	Pit partition wall, concrete, steel, XXS	6	50	2	23	c. ys.	7.17	165.00
	Forebay wall, concrete, XF	6	75	5	84	c. ys.	4.72	
	Pit floor, concrete-steel (same as foundation concrete)	.....	.....	.....	.....	.....	.....	397.00
	Pit roof concrete-steel, XXS	2	75	50	280	c. ys.	7.17	2,008.00
3.	Turbine Chambres: Dry type.							
	Steel for Item 2 concrete	.....	.....	.....	14,000	lbs.	.03	420.00
	Steel supports for machinery	.....	.....	.....	10	tons	120.00	1,200.00
4.	Station Building:							
	Walls, concrete-steel	20	250	2	370	c. ys.	7.17	2,653.00
	Roof, steel	.....	.....	.....	15	tons	120.00	1,800.00
	Doors and windows	.....	.....	.....	.....	.....	.....	300.00
5.	Rock excavation for Discharge Bay	10	30	50	560	c. ys.	.65	364.00
	Concrete lining of Discharge Bay, XXS concrete	10	160	2	120	c. ys.	7.17	860.00
	Widening and deepening to section of 209 sq. ft. rock	.....	1300	.....	9,750	c. ys.	.65	6,340.00
	State Canal Culvert (see details below)	.....	.....	.....	.....	.....	.....	5,978.00
	Total	.....	.....	.....	.....	.....	.....	$24,743.00

Transverse walls, four.. 10 x 100 x 3 of XX	Concr. 445 yds. at 5.73	$2,550.00
Arched roof ..... 2 x 100 x 30 of XXS	Concr. 400 yds. at 7.17	2,868.00
Steel	12,000 lbs. at 0.03	360.00
False work		200.00
		$5,978.00

Estimate for Development at Cuyahoga Falls, Ohio, on Cuyahoga River.

Equipment.

Item.	Plant and installation.	Units.	Per.	Cost.	Amount.
1.	Hydraulic:				
	Water wheels, included in Item 2 as per quotation of Allis-Chalmers Company of Dec. 17, 1908, in App. D.				
	Governors for W. Ws., included in Item 2 as per quotation of Allis-Chalmers Company of Dec. 17, 1908, in App. D.				
	Draft tubes, included in Item 2 as per quotation of Allis-Chalmers Company of Dec. 17, 1908, in App. D.				
	Pipe-line receiver, 50 feet of 78" ¾" pipe closed at ends secured to foundation	.....	.....	.....	$1,300.00
	Valves	2	.....	$1,500.00	3,000.00
2.	Electric at Power Station:				
	As per quotation in App. D. incl. Turbines with delivery cost added at 15 cents per 100 lbs. and installing at $6,000.00	.....	.....	.....	72,582.00
	Switchboard and testing instruments	.....	.....	.....	12,000.00
3.	Electric Transmission:				
	Transformers, step up	6,000 K.W.	.....	5.00	30,000.00
	Pole line, 16 miles to Akron or Cleveland (details below)	.....	mile	2,817.00	45,072.00
	Sub-station at Akron or Cleveland	.....	.....	.....	5,000.00
	Transformers, step down	6,000 K.W.	.....	5.00	30,000.00
4.	Operating and Repair Tools and Material:				
	Sub-station switchboard and testing instruments	.....	.....	.....	12,000.00
	Total	.....	.....	.....	$210,954.00

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3 Transmission Line.

Fifty-foot poles, set 8 ft. deep, 120 ft. c. s. poles, delivered at 0.00; shaped, barked and painted at $2.00, set at $2.00—

em 1—Poles, per mile 44, at $14.00 ..... $560.00
Cross-arms, 3¾ x 4¾, 8 ft. long—
em 2—Two per pole, at $1.00 in place, per mile 88.00
Insulators, suspended high tension type—
em 3—Six per pole, at $1.50 in place 396.00
Conductor to transmit 6,000 K. W. at 60,000 Volt pres-re with 5% line loss in 15 miles from Circular M. M.

$$= \frac{15x5,\ 400x11xCurrent}{Loss} + 10\%$$

$$= \frac{}{3{,}000} + 10\%$$

$$= 891{,}000 \times 106$$
$$= 31{,}185 + 10\% = 34{,}303$$

em 4—No. 5 hard drawn Copper, 33,100 c. m.
Weight per 1,000 feet, 121 lbs.
Required six conductors (for double line).
One mile 5,400 x 6 = 32,400 = 3,920 lbs.
At mill price of 15c and delivery of 12c per 100 lbs. $593.00
em 5—Stringing conductors at $20.00 per pole 880.00
em 6—Guying poles, placing lighting arrestors, etc 300.00

Per mile $2,817.00

Of Power Output.

The weight of falling water is the source, one cubic foot of water ighs 62.5 lbs., ten cubic feet falling ten feet in one minute is an energy of 62.5x10x10=6,250 pounds.

4 The unit of work is a horse-power which represents an energy capable of lifting 33,000 lbs. one foot in one minute 550 lbs. one foot in one second; therefore the above energy of 50 foot pounds is in horse-power 6.250

$$\frac{}{550} = 11.3$$

The physical fall for this project is from:

Elevation of upper level at 993 feet, less
Elevation of lower level at 635 feet

358 feet

The upper level is the crest of the Gaylord Dam, being also the el of water in Silver and Little Lakes, which appears to be the itation due to proprietary conditions; the lower level is the nor-

mal water surface in Cuyahoga river at the mouth of the Brandywine and the passing of the water between these points requires a certain fall, as all flow is due to fall.

In the open channels from Cuyahoga the point of diversion from Cuyahoga river to the beginning of the Pipe line, the fall is expressed by Slope in fractions of a foot per linear foot of waterway. The value of Slope "S" depends upon the hydraulic radius $R = \frac{\text{flow area}}{\text{wetted perimeter}}$ and the condition of the perimeter, the bed and sides, as retarding the flow by friction, symbolized by "n," the co-efficient of friction.

"R" in this case is $\frac{200}{54}$ approximately 4.

"n" for unlined earth channels is 0.17.

"v" is the velocity of flow, in this case 1.5.

The formula from which Slope is found as evolved by H. M. Bazin is $R\,S = (a + \frac{b}{R})\,V^2$.

a and b are constants expressive of "n."

585 For present conditions a = 0.00085, b = 0.00035.

Therefore $S = (0.000085 + \frac{0.00035}{4})\frac{1.5^2}{4}$.

$= 0.000171 \times 0.56$

$= 0.000096$

Or for 1,000 feet of channel or canal	0.096	feet
And for the total length of 68,100 feet	6.54	feet
Flow in Pipe line also consumes fall; this aggregates (see page 29)	7.08	feet
Total loss of head from upper to lower level	13.62	feet
Which deducted from the available 358 ft. is	344.38	feet

the effective head, provided the tail-race is so dimensioned that the flow therein will not exceed one foot per second, it will be taken at three hundred and forty-four (344) feet.

The accepted power flow is 300 second feet, and the avilable energy therefore from $\frac{300 \times 62.5 \times 344}{550} = 11{,}727$ hydr. horse-power.

The actual power output (electric) is that due to the efficiencies of Turbines and Generators, for which 80% and 93% respectively may be realized, or $0.80 \times 0.93 = 74.4\%$, which is taken at 74%, and therefore

$11{,}727 \times 0.74 = 8{,}675$ electric H. P. generated.

The loss from this in transmission is 8%, 1.5 stepping up and the same stepping down and 5% in line, the delivered energy is therefore

$8{,}675 \times 0.92 = 7{,}981$ electric horse-power

or $7{,}981 \times 746 = 5{,}953$ kilowatt, delivered.

Of Operation Cost.

This plant will require for night and day service an operating personnel of

e superintendent, at	$1,800.00
Having immediate charge of sub-station and supervising the generating plant.	
o operators at generating station	2,400.00
e operator at sub-station, nights	1,200.00
ur assistants, at $900.00	3,600.00
o linemen, at $1,200.00	2,400.00
ree dam attendants, at $360.00	1,080.00
o pile line tenders, at $600.00	1,200.00
and waste	300.00
	$13,900.00

Estimate for Development at Cuyahoga Falls, Ohio.

Summary.

ads and bridges	$68,716.00	
ms and embankments	67,493.00	
nal, flume, pipe line	314,893.00	
wer station	24,743.00	
uipment	210,954.00	686,799.00
gineering, 2½% (see below for detail)	.....	$17,170.00
Total		$703,969.00
st of E. H. P. delivered at Cleveland or Akron, Ohio (7,981)	88.21	

ansmission loss taken at 8%.

Annual Investment Balance.

ve per cent interest on bond issue of $1,000,000.00	$50,000.00	
demption Fund charge at 2%	20,000.00	
preciation at 2% of construction, $475,000.00	9,515.00	
preciation at 5% of equipment, $211,000.00	10,550.00	
erating power plant detail on page —)	13,900.00	
xes, 2% on valuation of $500,000.00	10,000.00	
dministration, officers of company, traveling, etc	10,000.00	
lue of output at $30.00 per E. H. P. per year (7,981)	.....	239,430.00
Surplus balance	115,385.00	

587 Engineering.

H. von Schon, Cons. Engr., will contract to do all the Engineering for two and one-half per cent of the estimated or contract cost of all works and equipment, such Engineering services to consist of:

Item 1—Making final surveys for plans and location of works, areas of storage and flowage, and borings on all locations.
Item 2—Preparing contract Plans and Specifications.
Item 3—Securing construction contract.
Item 4—Employing for general superintendence one resident engineer, and such concrete, steel pipe, mechanical and electrical inspectors as are required to closely inspect every construction and equipment operation.
Item 5—Reporting monthly on progress and cost of work to the Company.
Item 6—Testing material, equipment and completed plant. This proposal is based upon one year's construction period, during which the plant can readily be completed.

Of the Power Market.

This development would be about 16 miles from Akron, Ohio, and the same distance from Cleveland, Ohio, both cities consuming large amounts of electric current for lighting and power services.

The electric road system is also very extensive, to most of which the power plant will be central.

I have not made a detail canvass of either market point, as it is well known that Akron uses from three to four times and Cleveland probably eight times of the proposed output.

The power rates charged at Akron are from 3 cents per kilowatt hour up; at Cleveland the larger consumers obtain current at two cents. The Traction Companies claim to manufacture current at one cent.

588 *Table 5 of Kilowatt Hour and Horse-power Year Equivalents on the Basis of One Cent per Kilowatt Hour.*

Per day.	Hours of service per year.	Dollars per year for Elec. H. P.
Ten	3,000	$23.08
Seventeen	6,205	47.73
Twenty-two	6,600	50.78

Ten-hour is the service to industrial plants.
Seventeen to traction companies.
Twenty-two to continually operating mills.
This is for full 100% consumption.

From this it appears that if current were sold to the lowest price consumer, traction service, and the load factor, the per cent of actual current of the whole doing work, were put at 75% with a rate of one

er cent per kilowatt hour, that the annual revenue per horse-power ould be from $47.73 \times 0.75 = \$35.94$,

Or if the entire output at 100% load factor were disposed of to ny or several of the present power generating concerns at one cent er kilowatt hour, the annual revenue per horse-power would be bout fifty dollars.

To analyze the probable revenue from retail values for miscella- eous light and power current service would also necessitate the dding to estimates for distribution plant and equipment, and the ecessary operating personnel, which would require a special report.

It seems probable that the most resourceful disposition of this utput lies in selling it to present central power plants, and either kron or Cleveland affords ample market.

Of Supplemental Power Developments.

The elevation of the Hiram Reservoir Dam is 1,113 feet, that of the Gaylord Dam 993 feet, and there is therefore a fall of 120 feet between these two points, some of which may be developed.

589 The tributary Drainage area is 150 square miles at the Hiram Dam with a flow, at the Run-off, which is to be sus-

ained, of $\frac{300}{350} = 0.857$ cub. sec. feet per square mile; this is a power low of 128 cubic feet. The fall at the Hiram Dam is 1,113 — 1,090 = 23 feet, and a development at the dam would ield an output of 246 electric horse-power, which could probably e marketed at Hiram Spring and Mantua.

The cost of the Hiram development (dam having been charged to the Primary) is:

For power house	$4,000.00
For equipment	7,500.00
	$11,500.00

or per electric horse-power generated, 46.75.

The town of Kent is 16 miles down stream from the Hiram dam: the tributary catchment basin here is about 280 sq. miles, the power flow 240 cubic feet.

There is a dam at Kent 18 feet high; the power output here would he 396 electric horse-power, which could probably be marketed in Kent.

The cost of this development, the dam being serviceable, would be:

For power house	$5,000.00
For equipment	11,900.00
	$16,900.00

or per electric horse-power generated, 42.68.

The next dam on the river is at Munroe Falls which will practically be drowned by the proposed Gaylord dam and therefore the

development at the Hiarm dam of 246 E. H. P. and the development at the Kent dam of 396 E. H. P., a total of 642 E. H. P., is the sum of the feasible supplemental developments.

This completes my report.

H. VON SCHON,
Consulting Engineer.

[Endorsed:] Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

590 Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

State of Ohio, Summit County, *ss.* In Common Pleas Court. No. —. P't'ffs Exhibit 22. C. R. P. Co. vs. N. O. R. Co. A. M. W.

591 The Northern Ohio Traction & Light Company.

PL'T'F EXHIBIT 22.

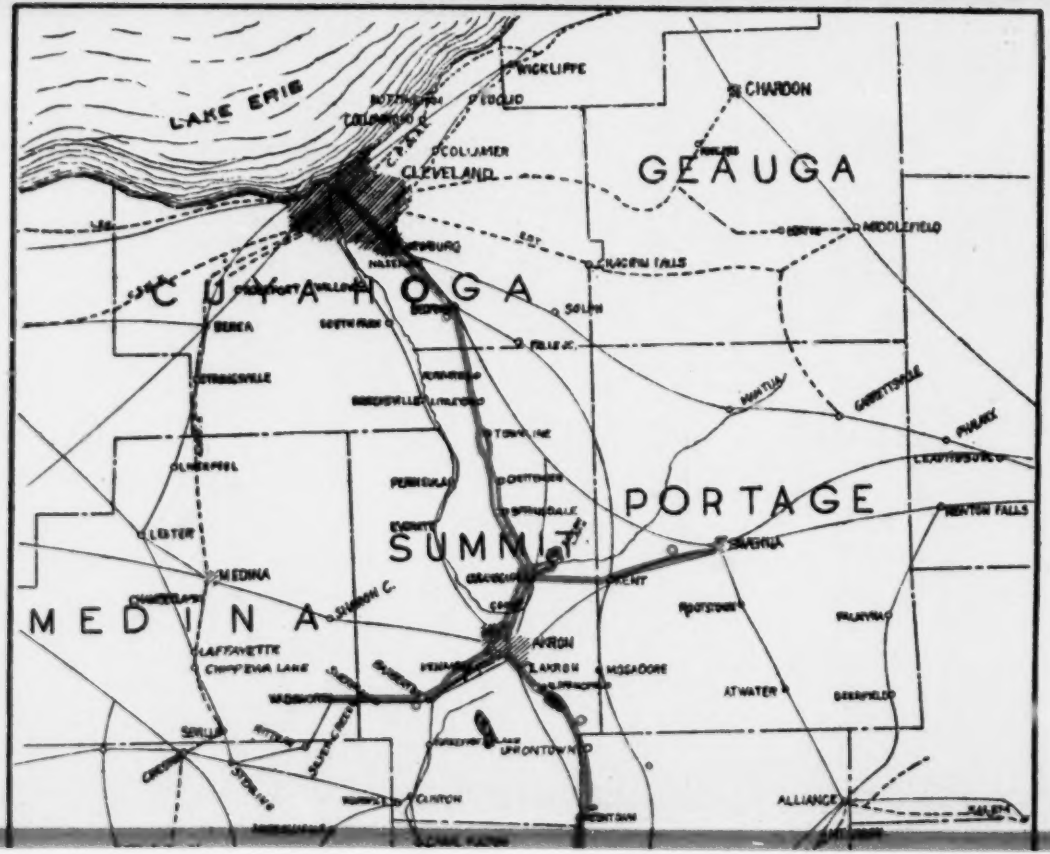
[Vignette.]

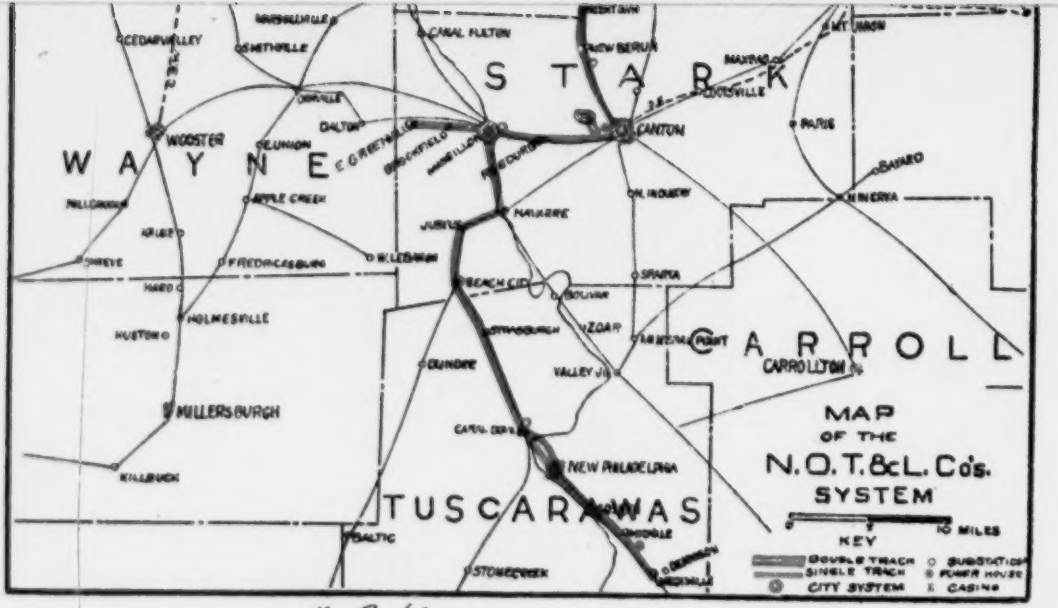
Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

State of Ohio. Summit County, ss: In Common Pleas Court. No. —. Pl't'f's Exhibit 22. C. R. P. Co. vs. N. O. R. Co. A. M. W.

Annual Report for the Year Ended December 31st, 1910.

(Here follows map, marked p. 592.)


LAKE ERIE
CLEVELAND
CHARDON
GEAUGA
MIDDLEFIELD
CUYAHOGA
BEREA
PORTAGE
SUMMIT
MEDINA
AKRON
ATWATER
ALLIANCE



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Cuyahoga River Power Co } p 592
&
Northern Realty Co

593 The Northern Ohio Traction & Light Company.

Report to the Stockholders for the Year Ended December 31*st,* 1910.

594 Directors.

H. A. Everett, Willoughby, O.; E. W. Moore, Electric Bldg., Cleveland, O.; C. W. Wason, Cleveland, O.; B. Mahler, Electric Bldg., Cleveland, O.; J. R. Nutt, Citizens Savings & Trust Co., Cleveland, O.; F. S. Borton, Guardeau Bldg., Cleveland, O.; Will Christy, Akron, O.; Charles Currie, Akron, O.; W. E. Hutton, Cincinnati, O.; L. E. Beilstein, Toledo, O.; C. J. McCuaig, Montreal, Canada.

Officers.

H. A. Everett, President, Cleveland, O.; Will Christy, 1st Vice President, Akron, O.; Charles Currie, 2nd Vice President and Gen. Mgr., Akron, O.; C. F. Moore, Secretary, Akron, O.; J. R. Nutt, Treasurer, Cleveland, O.; C. H. Lahr, Auditor, Akron, O.

595 The Northern Ohio Traction & Light Company.

President's Office.

CLEVELAND, OHIO, Jan. 21, 1911.

To the Stockholders of The Northern Ohio Traction & Light Company.

Earnings.

The Directors and Officers of your Company herewith submit the following report:

The gross revenue of the Company for the year ended December 31st, 1910, is $2,437,426.08, as compared with $2,177,641.90, showing an increase over the preceding year of $259,784.18, or 11.9%.

The operations of the system as compared with the years 1908 and 1909, are as follows:—

	1908.	1909.	1910.
Gross earnings for year.	$1,890,473.14	$2,177,641.90	$2,437,426.08
Operating and taxes..	1,086,423.64	1,190,057.06	1,348,963.15
Net Earnings ...	$804,049.50	$987,584.84	$1,088,462.92
Applied to payment of interest on bonds and collateral trust notes.	526,532.28	524,065.78	521,069.35
Available for Co.'s uses	$277,517.22	$463,519.06	$567,393.58
Dividends on stock...	134,151.00	157,500.00	225,000.00
Surplus	$143,366.22	$306,019.06	$342,393.58
Average mileage in operation	214	214.88	215.20
Gross earnings per mile	8,167.90	9,405.38	10,376.36
Net earnings per mile.	3,385.95	4,183.02	4,517.87
Ratio of expenses to earnings	57.47	54.65	55.34

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Mileage.

The mileage of the system has been increased 32/100 miles by the construction of additional double track on West Tuscarawas Street, in Canton, Ohio, making at the close of 1910, a total of 215.20 miles of track.

Additions and Improvements.

The total expenditure for additions and improvements for the year was $309,779.74, sub-divided as follows:

Track and roadway.....	$77,192.78
Power houses, car barns, etc.....	73,189.51
Cars and equipment.....	124,081.27
General expenditures	545.47
Light Department	34,770.71

Track.

During the year extensive repairs and renewals have been made on the various Divisions of the Company by way of re-ballasting, placing new ties and the laying of new rails. Twenty-eight Thousand One Hundred Thirty-three (28,133) ties have been renewed. The tracks of the Company are now in first-class condition in every particular.

In the City of Akron, on South Howard Street, from Market to Main Street, and on North Street, from Market to Federal Street, 2,100 feet of track was renewed with 103 lb. Trilby rail, laid on steel ties with concrete foundation and repaved with brick and asphalt.

On Bowery Street, for a distance of 4,000 ft., the old 50 lb. "T" ail and 7 ft. ties have been replaced with 7 in. 73 lb. girder rail id with 6x8x8 ft. ties on stone foundation and paved with brick.
In West Barberton, a new track of 7 in. girder rail was laid for distance of 4,200 ft., replacing a 50 lb. "T" rail.
In the City of Canton, numerous improvements and replacements ave been made on North Cleveland Avenue, West Tuscarawas treet, West Lake Street and McKinley Avenue.
In the City of Massillon, extensive improvements have been made n West Main Street by the substitution of 7 in. 73 lb. girder rail place of 60 lb. "T" rail.

Rolling Stock.

The rolling stock and electrical equipment of the Company have een maintained in good, first-class operating condition. Twenty dditional cars, including equipment, were placed in service during he fiscal year.

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Power Stations.

In the Beech Street power house at Akron, the following additional quipment has been installed:

One—1,000 K. W. Motor Generator Set.
One—600 H. P. B. & W. Boiler.
One—75 K. W. Motor Driven Exciter.
Three—300 K. W. Transformers.

In addition to the above we are now installing:

One—2,500 K. W. Turbo Generator.
One—1,000 K. W. Motor Generator Set.
One—75 K. W. Motor Driven Exciter.

In the Canton power house there was installed:

One—600 H. P. B. & W. Boiler, including the necessary stokers.

Car Barns and Real Estate.

The Canton car barns and shops were equipped with an auto- natic sprinkling system, and for the location of the new proposed ar barns and repair shops the Company has purchased, in the ity of Akron, 8 acres of real estate favorably situated for this pur- ose.

Lighting Department.

In the lighting department, we have continued the policy of lacing all wires in the business section in the City of Akron under- round. The overhead lines have been extended in various parts of he City to take care of the increased growth of business.

Pension Fund.

On April 1st, 1910, your Board of Directors authorized the creation of a Pension Fund from the earnings, on a basis of ¼ of 1%, for the benefit of employes who have grown old in the service or become totally disabled in the performance of their duties, such employes to be retired on 40% of their wages, based upon ten hours per day.

Depreciation.

The policy adopted by your Company in charging from income account a substantial amount for depreciation, has been continued, making a total to the credit of this fund December 31st, 1910, of $400,000.00.

Stockholders.

The Company has 785 stockholders of record, an increase of 75 over the previous year.

The reports of the heads of the various departments of the Company for the year 1910, are very comprehensive and full of valuable information, and are filed in the Company's office for inspection of the stockholders at any time.

Respectfully submitted,

H. A. EVERETT, *President.*

598 The Northern Ohio Traction & Light Company.

Office of 2nd Vice President and General Manager.

AKRON, OHIO, Jan. 21, 1911.

H. A. Everett, Esq., President.

DEAR SIR: I herewith submit statements of the general accounts, and tables showing the results of the operation of The Northern Ohio Traction & Light Company, for the fiscal year ended December 31, 1910, as follows:

Table "A" Condensed Balance Sheet.
" "B" Income Account.
" "C" Earnings and Expenses.
" "D" Earnings and Expenses by months.
" "E" Particulars of Bonded Debt.
" "F" Chart of Earnings, Operating and Surplus.

Very respectfully,

CHARLES CURRIE,
2nd Vice President and Gen. Mgr.

THIS PAGE BOUND VERTICAL IN BOOK

The Northern Ohio Traction & Light Company.

Condensed Balance Sheet, Years Ended December 31st, 1909 and 1910.

Assets.	1909.	1910.
Cost of road and equipment	$20,451,620.40	$20,927,576.75
Stock in treasury	1,000,000.00	1,000,000.00
Bonds in treasury (not certified)	1,090,000.00	1,088,000.00
Trustee bonds in treasury	3,432,000.00	3,400,000.00
Bonds pledged as security to collateral trust bonds	1,868,000.00	1,900,000.00
Electric Depot Co. stock	20,000.00	20,000.00
Bonds and stocks of other companies	12,650.00	12,030.00
J. R. Nutt, Trustee (coal lands)	40,768.99	.....
Will Christy, Trustee (right-of-way)	77,038.61	.....
A. M. Snyder, Trustee (right-of-way)	35,095.90	35,277.37
Current Assets.		
Cash on hand and in transit	13,515.66	193,072.87
Notes receivable	3,358.10	2,469.12
Due from individuals and companies	60,636.14	71,087.85
Material and supplies	64,013.89	89,327.16
Prepaid and unexpired accounts	10,080.48	9,944.78
Certified bonds in treasury	316,100.00	276,000.00
The Northern Realty Co.	.....	176,388.22
The Northern Ohio Power Co.	.....	1,533.59
Contingent Asset.		
Canton State Bank	2,809.60	1,836.47
	$28,497,687.77	$29,204,544.18

Liabilities.	1909.	1910.
Capital stock	$10,000,000.00	$10,000,000.00
Bonds	17,056,000.00	17,522,000.00
Current Liabilities.		
Accounts payable	70,755.91	87,671.62
Interest accrued but not due	53,694.10	53,520.76
Taxes accrued but not due	28,799.80	35,172.07
Customers' deposits	719.00	968.00
Sundry accounts	12,929.31	9,321.02
Reserve Liabilities.		
Uncollectible Light Dept. accounts	31.16	207.45
Injury and Damage Fund	18,522.02	20,871.07
Insurance Fund	9,070.05	.....
Depreciation	300,000.00	400,000.00
Income account	947,166.42	1,074,812.19
	$28,497,687.77	$29,204,544.18

600 TABLE "B."

The Northern Ohio Traction & Light Company.

Income Account for the Years Ended December 31st, 1909 and 1910.

	1909.	1910.
Gross earnings	$2,177,641.90	$2,437,426.08
Operating expenses and taxes	1,190,057.06	1,348,963.15
Net earnings	987,584.84	1,088,462.93
Int. on bonds and collateral trust notes	524,065.78	521,069.35
Available for Company's uses	463,519.06	567,393.58
Dividends	157,500.00	225,000.00
Bal. surplus for years ended Dec. 31st	306,019.06	342,393.58
Surplus on Dec. 31st, 1908 and 1909.	782,941.76	947,166.42
Total surplus Dec. 31st	1,088,960.82	1,289,560.00
Charged for depreciation, reconstruction, discount on bonds, etc.	141,794.40	214,747.81
Balance surplus, Dec. 31st.	947,166.42	1,074,812.19

601 TABLE "C."

The Northern Ohio Traction & Light Company.

Earnings and Expenses for the Years Ended December 1st, 1908, 1909 and 1910.

Earnings.	1908.	1909.	1910.
Passengers	$1,623,069.73	$1,875,334.18	$2,080,135.77
Light and power	142,543.52	156,614.32	204,434.26
Car mileage	4,106.82	4,244.82	4,420.44
Freight, etc.	44,615.06	58,595.78	67,421.94
Parks	66,656.79	69,746.53	70,309.44
Interest and discount.	2,589.11	5,469.03	5,496.36
Miscellaneous	6,892.11	7,637.24	5,207.87
Total	1,890,473.14	2,177,641.90	2,437,426.08
Expenses.			
Maintenance way and structures	100,159.94	140,179.68	174,326.45
Maintenance equipment	147,602.97	173,221.54	212,237.90
Operation power plants	243,201.56	267,342.19	291,590.34
Conducting transportation	355,319.61	365,718.15	399,230.51
General	240,139.56	243,595.50	271,577.95
Total	1,086,423.64	1,190,057.06	1,348,963.15
Net earnings	804,049.50	987,584.84	1,088,462.93

TABLE "D."

The Northern Ohio Traction & Light Company.

arnings, Expenses and Net Earnings by Months January to December, 1910, Inclusive.

	Earnings.	Expenses.	Net Earnings.
uary	$164,944.30	$94,500.25	$70,444.05
ruary	146,20€.62	92,513.44	53,693.18
ch	173,424.51	99,158.85	74,265.66
il	173,763.22	103,683.08	70,080.14
.....	207,323.25	111,249.65	96,073.60
e	221,673.23	123,124.97	98,548.26
.....	262,020.00	131,937.69	130,082.31
ust	263,149.18	135,832.80	127,316.38
ember	224,901.64	117,857.25	107,044.39
ber	208,341.89	113,370.95	94,970.94
ember	189,705.44	110,718.41	78,987.03
ember	201,972.80	115,015.81	86,956.99
Total	$2,437,426.08	$1,348,963.15	$1,088,462.93

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TABLE "E."

The Northern Ohio Traction & Light Company.

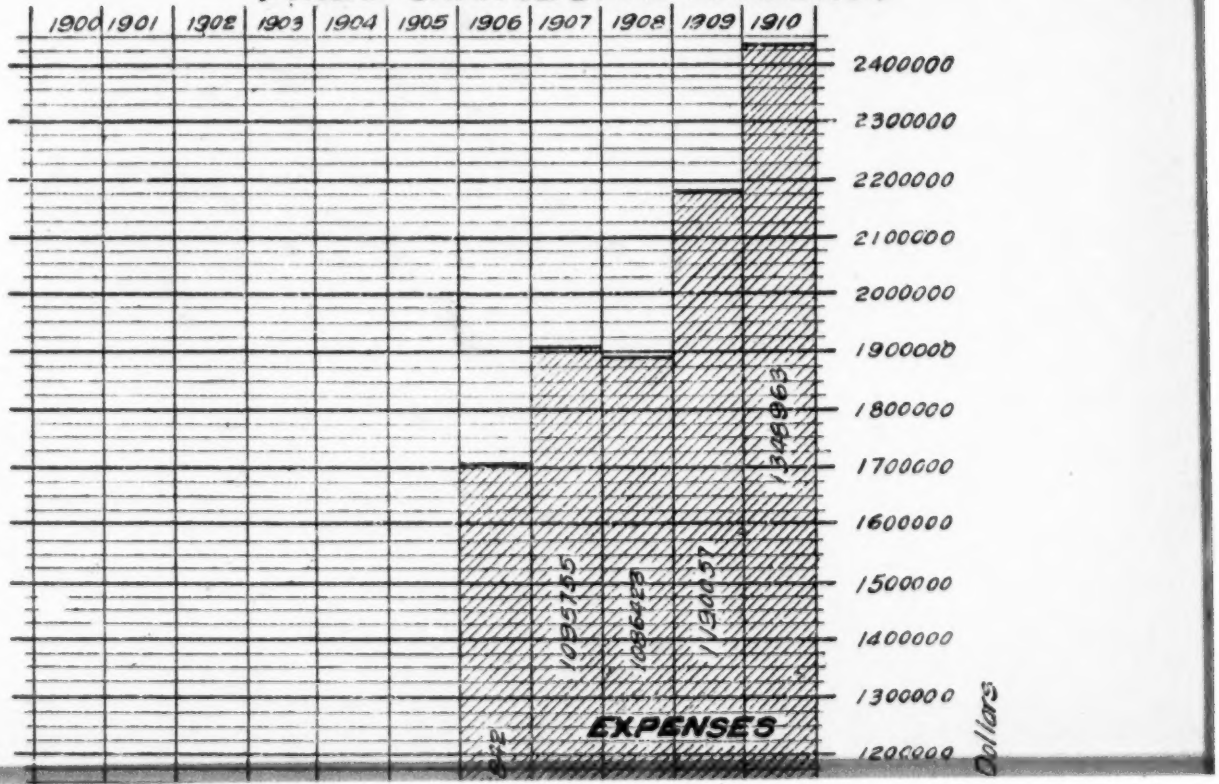
Particulars of Bonded Debt, December 31st, 1910.

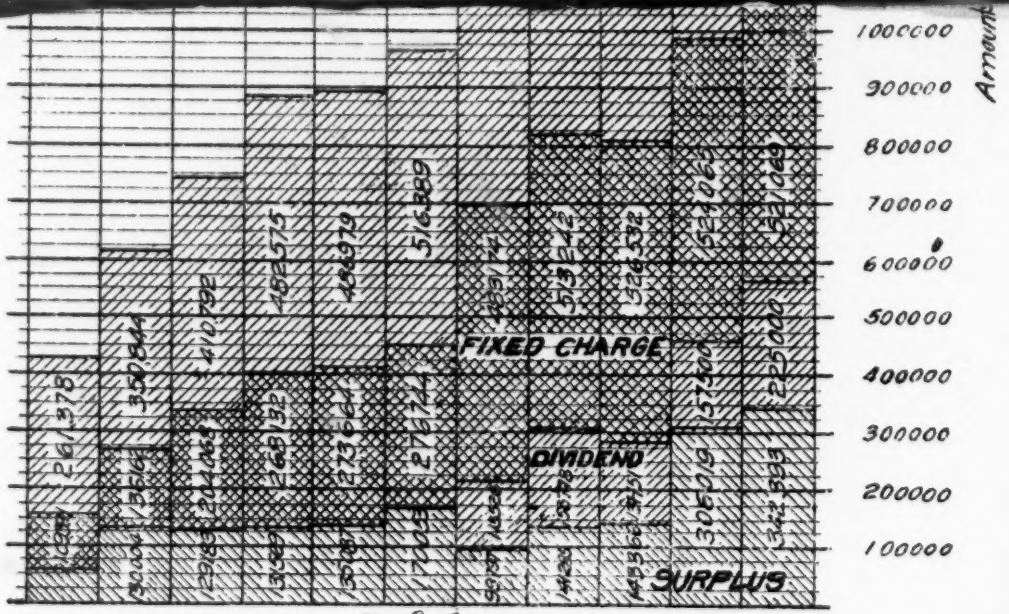
Class of Bonds.	Amount outstanding.	Rate.	Interest when payable.	Amount accrued during year.	Principal due.
Akron, Bedford & Cleveland R. R. Co., 1st Mtge	$300,000.00	5	Mar. and Sept.	$15,000.00	1915
Northern Ohio Traction Co., 1st Cons. Mtge	2,700,000.00	5	Jan. and July	135,000.00	1919
*Northern Ohio Traction & Light Co. Cons. Mtge.	1,000,000.00	5	Jan. and July	50,000.00	1933
*Northern Ohio Traction & Light Co. Cons. Mtge.	2,100,000.00	4	Jan. and July	72,559.65	1933
Canton & Massillon Electric Ry. Co., 1st Mtge	850,000.00	5	May and Nov.	42,500.00	1920
Canton, Akron Railway Co., 1st Mtge	1,150,000.00	5	Mar. and Sept.	57,500.00	1922
Lake View Land & Improvement Co	57,000.00	5	Jan. and July	2,900.00	1910–1916
Canton-New Philadelphia Ry. Co., 1st Mtge	565,000.00	5	Feb. and Aug.	28,250.00	1923
Tuscarawas Railroad Co., 1st Mtge	100,000.00	6	June and Dec.	6,000.00	1916
Tuscarawas Electric Co., 1st Mtge	.....	..	.....	533.32	....
Canton, Akron Cons. Ry. Co., Cons. Mtge	1,036,000.00	5	Jan. and July	51,330.56	1933
†Collateral Trust Serial Bonds	1,000,000.00	6	Feb., May, Aug. and Nov.	59,133.32	1911–1918
	$10,858,000.00			$520,706.85	

* These bonds are secured by the same mortgage and have the same lien on the property.

† The collateral pledged as security for this issue of Collateral Trust Serial Bonds consits of $1,000,000.00 N. O. T. & L. Co. 4's, due 1933; $700,000.00 Canton, Akron Consolidated Railway Co. 5's, due 1933; $200,000.00 Akron, Wadsworth & Western Traction Co., 1st mortgage 5's, due 1933. The said bonds shall mature $100,000.00 thereof on Nov. 1st, in each of the years 1911, 1912, 1913, 1914, and $150,000.00 thereof on Nov. 1st in each of the years 1915, 1916, 1917, 1918.

CHART SHOWING GROSS INCOME, EXPENSES, SURPLUS
FIXED CHARGES AND DIVIDENDS





No 342.
Cuyahoga River Power Co. } p 605
v
Northern Realty Co.

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Frederic W. Throssell.

Certified Public Accountant.

Citizens Building.

CLEVELAND, OHIO, January 18th, 1911.

The Northern Ohio Traction & Light Co., Akron, Ohio.

GENTLEMEN: In accordance with the request of your President, I have made an examination of the books and accounts of The Northern Ohio Traction & Light Company for the year ended December 31st, 1910, and hereby certify that the balance sheet submitted and showing a surplus at December 31st, 1910, of $1,074,812.19 is correct and agrees with the books of the Company.

Respectfully submitted,

FREDERIC W. THROSSELL,
Certified Public Accountant.

(Here follows diagram marked p. 605.)

606 P'T'FF'S EXHIBIT 19.

State of Ohio, Summit County, ss: In Common Pleas Court. No. —. P't'ff's Exhibit 19. C. R. P. Co. vs. N. O. R. Co. A. M. W.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

Established 1893.

The Roberts & Abbott Co., Incorporated, Engineers, Cleveland, Ohio.

Branch Offices: Chicago, Ill.; Baltimore, Md.; Cincinnati, O.
E. P. Roberts, M. E. President. Member Amer. S. O. C., M. E. Member Amer. Inst., E. E.
W. H. Abbott, E. E. Vice President.
Cable Address: eproco.
Western Union Telegraph Code.
Long Distance Telephones.
Mechanical, Electrical, Civil, Industrial and Architectural Engineers.
Plans, Specifications, Supervision, Final Tests, Electric Railway, Electric Lighting, Power Transmission, Heating and Ventilating, etc., etc. Efficiency Tests—Steam and Electrical. Preliminary Reports. Investigations of Operating Plants. Appraisals. Cement Plants. Water Power Development, Fire Prevention & Protection, Industrial & Architectural Engineering.

Subject Water Power Dev. Co.
Please reply under above heading.
Refer to W. H. A.
Address Your Reply to the Company.

CLEVELAND, O., April 29th, 1908.

Mr. W. R. Kimball, The Hollenden Hotel, City.

DEAR SIR: Please note letter which you can submit to people whom you wish to interest, a copy of which we suggest that you send to Mr. Sherman, stating that if he can make one as nearly like it as possible, that it will cover what you desire. You might call his attention to the fact that this amount of power is based on using power ten hours per day instead of 20 hours, viz., for manufacturing purposes, and also on obtaining practically all of the drop, about 235 feet.

We are sending you four copies of this letter.

Yours respectfully,
THE ROBERTS & ABBOTT COMPANY,
Per W. H. ABBOTT.

W. H. A.—O. M.
C. L.
Encl.

This letter to Bacon to get statement from Sherman May 3, '08.*

[* In pencil in copy.]

607 Property of The Cuyahoga River Power Co., Cleveland, O. Document No. Twenty-four (24) with Map No. Twenty-two (22).
Date June 3, 1908.
Reference Meeting of June 3, 1908.
" " April 29th.
Minutes " " April 23, 1909.
" " " April 6, 1912, also Map No. Twenty-two, (22).

Water Power Dev. Co.

W. H. A.

Mr. W. R. Kimball, Hollenden Hotel, City.

DEAR SIR: In reference to the water power project on the Cuyahoga River, please note that the results of our preliminary investigation are as follows:

We have gone over the report of Mr. C. E. Sherman of the National Engineering Company of Columbus, Ohio, the report of Mr. Wells, of the Cleveland Construction Company, Cleveland, Ohio, and the report of Mr. Bacon, the original promoter of the project, and also examined various maps and topographical sheets, and all of the Government reports of the flow of the river issued up to date.

Our engineers have also made an examination of the various sites and have investigated the possibilities of development.

608 From the data thus gathered, we feel assured that over 6,000 K. W. of electrical energy can be developed on this river if all of the falls in the village of Cuyahoga Falls itself, and the various rapids from there on down to a point near Akron, are secured. It is possible to develop all of this in one power house by the building of a pipe line, the power house in such case being located near the city limits of Akron, Ohio.

In order to obtain the above amount of power, it will be necessary to put in large storage reservoirs at some point above Kent, which reservoirs shall be of sufficient capacity to equalize the flow of the river, and enable the water to be used at an average rate all the year around, and to be used during ten hours per day, which will be the average period of demand for manufacturing service.

The various falls in the stream are now owned by a number of different people, and due to the project being distinctly unsuitable for fractional development, the greater part of the fall has not been utilized, and that part on which dams are built is largely running to waste. In order to make a successful project at least three-fourths of the total fall should be secured and a combined power house built.

609 A recent law, passed by the Ohio Legislature, gives the right of Condemnation, and if it is not possible to obtain control of the various powers by negotiation with owners, control can be obtained by applying this law of condemnation.

If this power is developed hydraulically and electrically a ready market for the same should be found in Akron, Barberton, Cuyahoga Falls, and other villages in this vicinity.

The average price at which electrical power is now being disposed of in these places is about six (6c) cents per K. W. hour. The average price which should be received from large manufacturing companies should not be less than two (2c) cents per K. W. hour.

Respectfully submitted,

THE ROBERTS & ABBOTT COMPANY,

Per W. H. ABBOTT.

610 Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

Preliminary Report on Water Power Development for the Big Cuyahoga Heat, Light and Power Company, Cuyahoga Falls, Ohio.

General Scheme.

The topographical map of Akron, Ohio and its vicinity, attached hereto, shows the proposition in a general way, which may briefly be described as follows.

There are two proposed power house sites which will hereafter be designated as the lower power and the upper power. The lower power is designated on the map as being located on the Big Branch of the Cuyahoga River a short distance west of the corporate limits of the Village of Cuyahoga Falls, Ohio. From the site of the lower power to the point marked "dam" there is a difference in elevation from the level of the water in the river at the power house to the bottom of an old raceway, known as the "Chuckery Race" at the proposed dam site of 166 feet.

The proposed dam is to be 70 feet in height, and is to flood and displace five existing dams located in the Village of Cuyahoga Falls, the upper one of which is located near the business center
611 of the town. At this upper dam the water is backed up in the river to Monroe Falls, where an existing paper mill utilizes approximately ten feet of fall in the river. The paper mill dam at Monroe Falls backs the water up the river to the proposed upper power at Kent, where there is now a twenty foot head of water. From the upper power at Kent the water backs up the river to where it is crossed by the Cleveland and Pittsburg Division of the Pennsylvania Railway.

The general scheme is to conduct such flow of the Cuyahoga River as will be used by the lower power from the proposed seventy feet dam by a canal, which is marked in red on the attached map. The lower and upper powers will be connected by a transmission line.

Discharge.

No extensive set of gaugings of the Cuyahoga River have been made for this section. The best available data are the gaugings made

by the Hydrographic Department of the Geological Survey of the United States Government at Independence, Ohio, for the years 1903 and 1904, covering a drainage area of 698 square miles. The drainage area above the proposed lower power at Cuyahoga Falls is said to be 320 square miles.

The following table gives the relative discharge in Sec. Ft. of the Cuyahoga River at Cuyahoga Falls and Independence.

612 *Relative Discharge of Cuyahoga River.*

	Sec. ft.—Calculated for drainage area of 320 sq. mi. Proportional to quantities in fourth column.	Sec. ft.—Taken from Govt. report of measurements at Independence, Ohio, 10 mi. south of Cleveland. Drainage area, 698 sq. mi.		
		Max.	Min.	Mean.
January	556	3,445	349	1,220
February	1,433	6,170	2,096	3,137
March	1,070	6,380	660	2,342
April	750	6,380	550	1,641
May	438	2,845	414	959
June	500	5,330	255	1,094
July	250	774	317	546
August	132	812	111	288
September	42	157	37	93
October	48	157	37	104
November	50	157	37	109
December	35	142	10	76

613 From the above table it will be noted that for the last five months in the year the discharge per month is considerably lower than during the first part of the year. It is therefore proposed to make up the deficiency in flow for the last five months of the year by constructing a storage reservoir north of the Cleveland and Pittsburg Division of the Pennsylvania Railroad in Streetsboro and Franklin Townships, as shown by the red lines on the attached map. The main reservoir covers approximately 1,760 Acres of land and will have a storage capacity of approximately 1,341,648,000 cubic feet of water. Lake Pippin, at the proposed flow line, as indicated in red, covers approximately 173 Acres, and has a storage capacity of 187,525,800 cubic feet. Above Monroe Falls there is storage capacity in the river of approximately 11,880,000 cubic feet of water, making the total storage for use during the dry season at the lower power of 1,541,053,800 cubic feet, or 119 Sec. Ft. Taking the average flow of the stream for five months in the year at 62 Sec. Ft. gives a total discharge at the lower power of 181 Sec. Ft., which is equivalent to 11,340 theoretical Horse Power.

Assuming the same flow for the upper power as for the lower power, there is available at the upper power 980 theoretical Horse Power.

614 For a considerable portion of the year the flow in the r
is largely in excess of the amount above stated, and the c
from the dam to the lower power has therefore been designe
carry at least 550 cubic feet per second. This amount of flow
each of the powers will give, in addition to the above stated amo
23,160 Horse Power at the lower site, and 2,020 Horse Power at
upper site.

Referring to the topographical map attached hereto, it will
noted that there are a number of lakes in the vicinity of Kent
are tributary to the Cuyahoga River, and there are others not sh
on the map, viz., Congress Lake emptying into Congress Creek, wh
lake lies east of Muzzy Lake, and Chardon and Punderson La
lying north of Streetsboro and Shalersville townships.

The head waters of the Cuyahoga River, having the large pond
area afforded by the lakes above referred to, it has not the exces
floods to which many of our streams are subject. The proposed la
artificial reservoir will also assist in regulating the flow, as well a
conserve the flow during the dry season. Twin Lakes, lying im
diately west of the proposed storage reservoir drain southerly ac
the Pennsylvania Railroad and into the Cuyahoga River, and
will be noted that with a very small amount of work a channel co
be cut from the proposed reservoir into Twin Lakes, th
615 two lakes thereby being flooded to the height of the propo
reservoir and at the same time increasing their storage
pacity practically double the amount of water now contained
them.

Possible Additional Power.

No reference has been made to Monroe Falls in this report
cepting in relation to storage. It might be stated here that the
foot fall at this place would afford approximately 450 theoreti
primary Horse Power, and it has been stated by Mr. Bacon that
power rights at Monroe Falls, now held by the paper mill compa
could be purchased for about Twenty-five Thousand ($25,000.0
Dollars.

616 ## Electrical Installation.

The electrical installation at the lower power is based on installi
three 4,000 kw. generators direct connected to turbines, such nu
ber being considered as desirable for primary power, and for
secondary power three additional generators of the same capaci
At the upper power three generators of 400 kw. capacity for prima
power, and one generator of 1,200 kw. capacity for secondary pow
are included.

Whether or not it will be advisable to install the upper plant
the start will require further consideration, but when it is install
it will not only be of value as an addition to the lower power, b
also it may be found that the most economical operation will res
from operating only the upper power during the time of light loa

that is the latter part of the night, or at such time as the units in such plant are of sufficient capacity for the load.

The estimate includes the connecting of the upper and lower powers by a transmission line.

The electrical installation is estimated on the basis that their market for power will be mainly at the switchboard of the lower power (see paragraph "Market for Power") although there is an allowance of $42,000.00 for transmission line between the two power houses. The estimate does not provide for either step up or step down transformers, but is based on the generators furnishing energy at 10,000 to 13,000 volts, which will be sufficiently high voltage for transmission within such distance of the power house as it now seems probable all the power can be marketed, but if it is necessary to go to greater distances, then step up and step down transformers will have to be furnished, and transmission lines, and possibly right-of-way will have to be obtained for such lines, and such have not been herein estimated. Whether or not step down transformers will have to be furnished will depend upon the contract entered into.

617

Whether the generators will be of the 25 cycle or the 60 cycle type will depend upon the customer. For such portion as may be sold to the Northern Ohio Traction Company the generators will probably be 25 cycle, such Company changing such portion of the energy as they might require for lighting purposes to 60 cycle current. If, however, The Big Cuyahoga Heat, Light and Power Company enter into the field as general distributers, doing a retail business, it will be necessary to furnish 60 cycle current and the necessary apparatus will have to be provided.

Market for Power.

The estimate is based on obtaining a market for all, or practically all, of the primary power at the switchboard at the lower power house. In other words, that The Northern Ohio Traction Company may take the greater portion, if not all, of the primary power and possibly some of the secondary power, although, it is possible that the best arrangement will be to sell a large part of the secondary power to The Northern Ohio Traction Company with little, if any, of the primary, and what will be the best arrangement we are not now prepared to state.

618

Whether it will be best for The Big Cuyahoga Heat, Light and Power Company to do a wholesale business only, furnishing The Northern Ohio Traction Company (which acts as distributer for Akron and considerable distances therefrom) and possibly a few large power consumers, if same can be furnished power by this Company without conflicting with the franchises of The Northern Ohio Traction Company or so interfering with its business that it will not enter into contract with this Company, or whether it will be better to act as retail distributers, obtaining franchises in cities and towns and furnishing to the consumers direct, is a matter which will require careful and detailed investigation. The former has the great

advantage that if satisfactory contract is entered into, the incom
will be undoubtedly assured and presumably the Company will b
free from competition, delays etc. On the other hand, if power i
furnished in a retail manner, the gross income will be largely in
creased, but so also will be the first cost and the operating expenses
and moreover it will be at least a considerable time before the marke
can be developed up to the capacity of the plant. The retail busines
may ultimately be the best, but as before stated, both plans shoul
be carefully worked out and a thorough investigation made of al
the conditions before the policy is decided upon, and as the
619 wholesale plan gives promise of resulting in an excellent prop
osition, it is possible that considerable of the retail basis can
wisely be deferred, at least for the present, but if it is now to be
considered, sufficient time must be given for careful investigation.

In connection with the question of market for the power it should be noted that Kent, Alliance, Canton and Ravenna and Massillon, all manufacturing cities, are within easy transmission distance, and also that the lines of the Cleveland, Southwestern and Columbus Railway and the Eastern Ohio Traction Company, both large consumers of power are within working distance.

The rate assumed under consideration of income is based on one cent (1¢) per Kilowatt hour for primary power and five tenths (.5¢) cent for secondary power. We believe the Company, with ordinarily prudent management, can sell all the output at these rates. We also believe that, with large investment, there is a probability of obtaining rates fully 50% higher on a retail basis.

Operating Expenses.

The operating expenses are based on a wholesale business therefore not requiring any considerable office or field force. A managing superintendent is provided, with one clerk and two shifts at each
of the two power houses so that same can operate continuously.
620 It also includes what we now consider to be a liberal allowance for maintenance and depreciation, especially considering the character of construction on which the estimated first cost is based.

621 *First Cost.*

For the canal leading from the dam to the lower power, we have estimated on an open channel lined with concrete, and that the upper portion of same will be largely rock excavation. In the estimate of cost are included two highway crossings, provision for cross drainage, for an intake at the dam and a penstock leading from the end of the canal to the turbines at the power house.

The estimated cost	$172,500.00
The estimated cost of concrete dam at upper end of the canal is	80,500.00
The estimated cost of improving the upper power is...	20,000.00

The dam at the storage reservoir north of the Pennsylvania Railroad is estimated to follow the embankment of an abandoned portion of said Railroad. Included in the cost is a reinforced concrete dam at the river to afford spillway for flood water.

Total estimated cost for raising and enlarging the old embankment of the Pennsylvania Railroad, and for the spillway above mentioned.....		$118,500.00
Raising bridge and highway across proposed reservoir.		5,000.00
Estimated cost of real estate for storage reservoirs. This is on the basis of 2,500 acres at $60.00 per acre, which is the valuation per acre placed on the land by Mr. Willis Bacon.....	$150,000.00	
1922		
Continued	$150,000.00	
River Properties—as instructed by W. R. Kimball	100,000.00	
Right of way for canal, as guessed by The Roberts & Abbott Co.....	25,000.00	
		$275,000.00
		$671,500.00
Consider as		$675,000.00

1923 *First Cost.*

Mechanical & Electrical Equipment & Bldgs.

	Primary.	Secondary.
Lower Fall—		
Three—4,000 kw. generators.....	$300,000.00	
" additional "	.....	$280,000.00
Upper Fall—		
Three—400 kw. generators; one 1,200 kw. additional, including transmission line between Power Houses.	$55,000.00	$38,000.00
Total	$355,000.00	$318,000.00
Grand total		$673,000.00

Totals.

Dams, Canals & Real Estate	$675,000.
Machinery & Buildings	$673,000.
Transmission Line for some power not delivered to Northern Ohio Traction Company at Lower Power Switchboard	$42,000.
	$1,390,000.
Incidentals & Engineering and Legal 20%—probably large but data insufficient, see Introductory Special Note	$278,000.
Interest during Construction, $1,400,000 for ½ year at 6% annually	$42,000.
Grand Total	$1,710,000.

624

Operating Expense.

(Wholesale Basis.)

Office and Power House Force, Oil and Waste, Telephones and Incidentals	$20,000.0
Insurance—None.	
Taxes—1½ per cent on one-half first cost—exclusive of legal, engineering, etc.—Consider as $1,500,000.00.	11,250.0
Maintenance and Depreciation	62,000.0
	$93,250.0

Income.

(Wholesale Basis.)

Primary Power.

Lower Power:—	
22,000,000 K. W. Hours Annually at 1¢	$220,000.00
Upper Power—	
1,750,000 K. W. " " " "	17,500.00
	$237,500.00

Secondary Power.

Lower Power—	
22,500,000 K. W. Hours Annually at .5¢	$112,500.00
Upper Power—	
2,000,000 K. W. " " " "	10,000.00
	$122,500.00

25 Income—Cont'd.

Gross earnings	$360,000.00
Operating Expenses	93,250.00
Net Income	$266,750.00

E. P. R.

If chemical plants can be induced to locate in the vicinity served, then possibly the income from secondary power can be further increased.

E. P. ROBERTS.

26 Filed Jan. 31, 1910. Supreme Court of Ohio. John S. McNutt, Clerk.

Property of The Cuyahoga River Power Co., Cleveland, O., with Document- No. 26-30, Map No. 22.
Date June 30, 1908.
Reference M't'g June 3, '08.
" Apr. 23, '09.
" " 8, '12.

PL'T'F'S EXHIBIT V.

Description of Parcels of Property.

C. M. Walsh—Parcel No. 1 (Walsh Milling Co.).

Beginning at the intersection of the center of the Cuyahoga River at the north side of Portage Street in the Village of Cuyahoga Falls, Summit County, Ohio, thence westerly along the north side of Portage Street to the intersection of the high bank of the west side of the Cuyahoga River and the north side of Portage Street: thence northerly along the said high bank on the westerly side of the Cuyahoga River to a point 30 feet north of the crest of the dam, as now located, of the Walsh Milling Company; thence easterly to the center of the Cuyahoga River to a point approximately 30 feet north of the crest of aforesaid dam: thence southerly along the center of the Cuyahoga River to the place of beginning. Containing approximately 0.5 acres with all the privileges, easements and appurtenances thereunto belonging.

C. M. Walsh—Parcel No. 2.

Beginning at a point in the center of Prospect Street in the Village of Cuyahoga Falls, Summit County, Ohio, on the high bank of the Cuyahoga River on the easterly side thereof; thence westerly along the center of said Prospect Street to the high bank on the westerly side of said River: thence northerly along the high bank of said

river to the north line of said C. M. Walsh's property where sa
joins the property of the Walsh Paper Company: thence easter
following the said north line of C. M. Walsh's property across t
Cuyahoga River to the high bank on the easterly side of same: ther
southerly along the high bank of the easterly side of said Cuyaho
River to the place of beginning. Containing 0.9 acres, more or le
with all the privileges, easements and appurtenances thereunto
longing.

627 The Falls Rivet & Machine Company—Parcel No. 1.

Beginning at the point of intersection of the center of the Cu
hoga River and the north line of Portage Street, in the Village
Cuyahoga Falls, Summit County, Ohio: thence northerly along t
center of said River to a point approximately 30 feet north of t
crest of the Walsh Milling Company's dam, as now located: then
easterly to a point on the high bank of the Cuyahoga River on t
easterly side thereof, said point being approximately 30 feet north
the crest of the aforesaid Walsh Milling Company's dam: then
southerly along the high bank on the easterly side of the Cuyaho
River to the north line of Portage Street: thence westerly along t
north line of Portage Street to the place of beginning. Containi
approximately 0.4 acres more or less, with all the privileges, ea
ments and appurtenances thereunto belonging.

The Falls Rivet & Machine Company—Parcel No. 2.

Beginning at a point on the westerly bank of the Cuyahoga Rive
said point being north 34° 35′ east 380.16 feet, and north 32° ea
89.1 feet from a stone set in the north line of Chestnut Street in t
Village of Cuyahoga Falls, Summit County, Ohio, both of these lin
being along lines of land owned by the heirs of J. Millbank: then
in a line which passes through a recess which is cut into a large ro
near the east edge of the water of the Cuyahoga River to receive t
end of the timber of the "Chickery" dam, and through a point on t
west side of the gorge south of the husk or wheel house, which poi
is about 24 feet south of a mark cut in the perpendicular rock on sa
west side near the bottom by F. D. Paul and G. B. Turner, the ea
end of said line being on the top of the east bank of the river: then
north 31° 45′ east 237.6 feet: thence north 10° east 258.72 fee
thence north 14° east 178.21 feet: thence north 80° 45′ we
628 99 feet along the south line of the Cyrus Prentis tract. Th
west end of this line may also be found by beginning in t
east line of Front Street 1.69 chains north 9° 15′ east of the fir
angle in the east line of said Front Street south of Broad Street, an
which line is also 21 links south of the center line of Prospect Stree
thence along the easterly line of land belonging to Fannie S. Beeb
to the southeasterly corner of her land: thence along the southerl
line of said Fannie S. Beebe's land one rod: thence in a southerl
direction to a point one rod westerly from the place of beginning
thence one rod east to place of beginning. Containing approx

mately 1.5 acres, more or less, with all the privileges, easements and appurtenances thereunto belonging.

Turner, Vaughn & Taylor.

Beginning at the intersection of the westerly high bank of the Cuyahoga River, and the north line of Portage Street in the Village of Cuyahoga Falls, Summit County, Ohio; thence westerly along the north line of Portage Street 49½ feet: thence southerly across said Portage Street to the south line of same; thence easterly along the south line of said Portage Street 49½ feet to the said westerly high bank of the Cuyahoga River; thence southerly along the high bank of the Cuyahoga River on the westerly side thereof and following the meanderings of same, across Broad Street in said Village of Cuyahoga Falls, Summit County, Ohio, to the dividing line between the property of said Turner, Vaughn & Taylor Company and the property of the Walsh Paper Company: thence easterly across the Cuyahoga River to the southeast corner of the property of said Turner, Vaughn & Taylor Company on the easterly high bank of said Cuyahoga River: thence northerly along the high bank of said Cuyahoga River on the easterly side thereof and following the meanderings of same across Broad Street in said Village of Cuyahoga Falls, and across Portage Street also in said Village of
629 Cuyahoga Falls, to the northerly line of said street; thence westerly along the north line of said street to the place of beginning. Containing approximately 6.3 acres more or less, with all the privileges, easements and appurtenances thereunto belonging.

The Walsh Paper Company.

Beginning at the intersection of the westerly high bank of the Cuyahoga River in the Village of Cuyahoga Falls, Summit County, Ohio, and the dividing line between the property of said Walsh Paper Company and the property of Turner, Vaughn & Taylor Company: thence southerly along the high bank of the Cuyahoga River on the westerly side thereof and following the meanderings of same, to the line between the property of the said Walsh Paper Company and the property of C. M. Walsh: thence easterly across the Cuyahoga River to the southeast corner of the property of said Walsh Paper Company, said corner being on the easterly high bank of said River: thence northerly along the high bank of said River on the easterly side thereof and following the meanderings of same to the southeast corner of the property of Turner, Vaughn & Turner Company, said corner being also the dividing line between the property of Turner, Vaughn & Taylor and the said Walsh Paper Company: thence westerly across the Cuyahoga River to the place of beginning. Containing approximately 0.8 acres, more or less, with all the privileges, easements and appurtenances thereunto belonging.

Fannie S. Beebe.

Beginning at the northwest corner of said Fannie S. Beebe's property on the north line of Prospect Street and on the west side of the

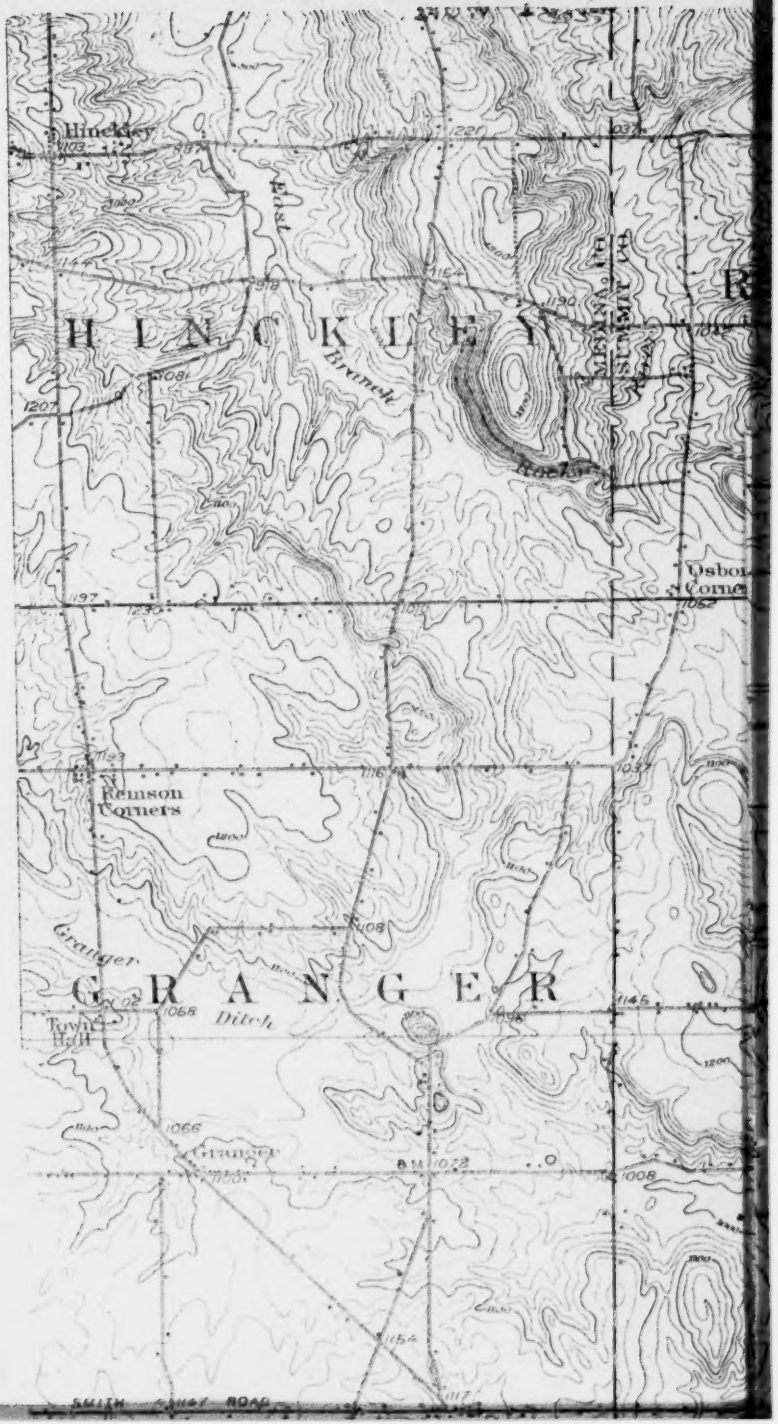
Cuyahoga River, in the Village of Cuyahoga Falls, Summit Coun
Ohio: thence southerly along the west line of said Fannie S. Beeb
property to the southwest corner of same: thence easterly along t
line between the property of said Fannie S. Beebe and the property
The Falls Rivet & Machine Company: thence northerly alo
630 the line between the property of said Fannie S. Beebe and t
property of The Falls Rivet & Machine Company, said li
being the easterly line of the property of said Fannie S. Beebe,
the south line of Prospect Street: thence westerly along the south li
of Prospect Street to the place of beginning, being all of the lot
land belonging to Fannie S. Beebe lying south of Prospect Street a
West of the Cuyahoga River. Containing .67 acres of land more
less, with all the privileges, easements and appurtenances thereun
belonging.

A. B. & C. R. R. Company.

Beginning at an iron pin at the southwest corner of said Railro
Company's land, said pin being on an island in the Cuyaho
River: thence north 1° 20′ east along said Railroad Company's w
line to a point 100 feet distant from the center of the Cuyaho
River, measured at right angles with same: thence southeasterly
the south line of said Railroad Company's property at a point 1
feet distant from the center of the Cuyahoga River, measured
right angles with same: thence along the south line of said Railro
Company's land to the place of beginning. Containing —— acr
more or less, with all the privileges, easements and appurtenan
thereunto belonging.

Henry A. Everett.

Beginning at the point of intersection of the center of the Cu
hoga River and the north and south township line between Porta
Township and Cuyahoga Falls township: thence north 0° 30′ e
100 feet: thence easterly and southeasterly along the northerly ba
of said Cuyahoga River 100 feet distant from the center line of s
River, following the meandering of same, to a point on the li
between the property of said Henry A. Everett and the property
said A. B. & C. R. R. Company, said point being 100 feet direc
from the center of the Cuyahoga River, measured at right ang
with same: thence southerly 1° 20′ west along said line
631 tween the property of Henry A. Everett and the property
the A. B. & C. R. R. Company to the southwest corner
the property of said A. B. & C. R. R. Company: thence southe
88° east of the south line of the property of the A. B. & C. R.
Company, said line being the dividing line between the property
the A. B. & C. R. R. Company and the property of Henry
Everett, to a point 100 feet distant from the center of the Cu
hoga River, measured at right angles with same: thence sou
easterly and northeasterly along the northerly bank of the Cu
hoga River 100 feet distant from the center line thereof, and


HINCKLEY
GRANGER
Hinckley
Brunch
Rock
Remson Corners
Granger
Town Hall
Ditch
SMITH CHASE ROAD

MAPS

TOO

LARGE

FOR

FILMING

lowing the meanderings of same, to a point on a line of the land of said Henry A. Everett, said line being an extension northerly of the east line of Tract No. 3, Portage Township, Summit County, Ohio, and also being 100 feet distant from the center of the Cuyahoga River measured at right angles with same: thence northerly along said line to a stone pipe: thence northerly along the high bank of the Cuyahoga River and one rod westerly on same the following courses and distances: 34° 35′ east 264 feet: thence northerly 27° 35′ east 286.44 feet: thence northerly 2° 30′ west 116.16 feet: thence northerly 24° 10′ west 138 feet: thence northerly 8° 40′ east 107.6 feet: thence northerly 19° 31′ east 108.24 feet: thence northerly 36° 40′ east 168.3 feet: thence northerly 53° 40′ east 454.7 feet: thence northerly to the northeast corner of the lot owned by Tom Patterson: thence northerly following along the westerly bank of said Cuyahoga River to the southeast corner of the property of the Falls Rivet & Machine Company: thence along the line between the land of—

(Here follows map marked pp. 632, 633 & 634.)

635 Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

Transcript of Docket and Journal Entries to Court of Appeals.

General Code, Secs. 12263 to 65.

Common Pleas Court, Summit County, Ohio.

No. 16979.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff in Error,
vs.
THE NORTHERN REALTY COMPANY, Defendant in Error.

May 12th, 1911.—Petition in error, and precipe, filed. Summons in error issued to Sheriff Fergusson.

May 13th, 1911.—Transcript from Probate Court, filed.

May 19th, 1911.—Summons in error returned endorsed "Received this writ May 13th, 1911, at 4 o'clock P. M., and pursuant to its command on May 18th, 1911, I personally delivered a true and certified copy of this writ to Will Christy, president of The Northern Realty Company. David R. Fergusson, Sheriff. By F. M. Jewell, Deputy.

September 18th, A. D. 1911.—April Term. It is ordered by the court here that this cause be and the same hereby is continued to the next term of this court.

September 27th, A. D.—September Term. Be it remembered that on the 27th day of September A. D. 1911, being a day in the September Term A. D. 1911 of this court, the said parties appeared by their attorneys, and this cause came on to be heard upon the petition in orror of the said The Cuyahoga River Power Company, plaintiff in error, herein, together with the original papers and pleadings and a duly certified transcript of the orders and judgment of the Probate Court of Summit County, Ohio, filed therewith in the said Court of Common Pleas wherein plaintiff in error was plaintiff and defendant in error was defendant, mentioned and referred to in said petition in error, and was argued by counsel; upon consideration whereof the court find that there is no error manifest upon the face of the record in said orders and judgment of said Court of Common Pleas.

It is thereupon considered, ordered and adjudged by the court that the judgment and proceedings of the said Probate Court in said cause in favor of said defendant in error and against said plaintiff in error be, and the same are hereby in all things affirmed; there being, however, in the opinion of the court, reasonable ground for this proceeding in error.

It is further considered and ordered, that the plaintiff in error pay the costs of this proceeding in error, taxed at $— and in default thereof that execution issue therefor.

To all of which orders, judgment and decrees plaintiff in error excepted and here and now excepts. J1,60-194.

(Taken to Circuit Court Sept. 28, 1911, under #992).

March 16th, 1914. Depositions for Pl'ff, filed.

March 16th, 1914. Motion, filed.

March 17th, 1914. January Term. On motion of defendants, it is ordered that plaintiff give security for costs herein to ac-
636 crue. A deposit with the Clerk of One Hundred Dollars in money shall be deemed to be a sufficient compliance with this order for the time being. J1.64-680.

March 18th, 1914. Bond, filed.

March 18th, A. D. 1914. January Term. On motion of The Northern Ohio Traction & Light Company, which claims an interest in this proceeding, it has leave to become a defendant herein and file an answer by the 10th day of March, and upon motion of The Northern Realty Company, said The Northern Realty Company has leave to file an answer herein by March 10th. J1.64-686.

April 13th, A. D. 1914. January Term. It is ordered by the court here that this cause be and the same hereby is continued to the next term of this court.

May 1st, A. D. 1914. April Term. This cause came on to be heard upon the pleadings, evidence and exhibits and was argued by counsel and submitted to the court. Whereupon the court finds the issues in favor of the defendants and against the plaintiff. It is therefore ordered and adjudged that the petition of plaintiff herein be dismissed, and judgment is rendered against plaintiff for the costs herein taxed at $—. To which judgment and order of the court the plaintiff here and now duly excepts. J1.65-134.

May 11th, 1914. Bill of Exceptions, filed.

May 11th, 1914. Notice of filing Bill of Exceptions mailed to Rowley, Mather & Eagleson. Bert C. Garman, Clerk.

May 20th, 1914. Bill of Exceptions transmitted to Trial Judge W. J. Ahern, Jr. Bert C. Garman, Clerk.

May 21, 1914. Bill of Exceptions again received from Trial Judge W. J. Ahern, Jr., corrected and allowed. Bert C. Garman, Clerk.

637 & 638 THE STATE OF OHIO,
Summit County:

I the undersigned, Clerk of the Common Pleas Court, in and for said County, do hereby certify that the foregoing is a true transcript of the Docket and Journal Entries of said Court in the above entitled cause, and that the said — entered into a written undertaking with approved suret-, conditioned to abide and perform the order and judgment of the Court of Appeals, and to pay all moneys, costs and damages which may be required of or awarded against said — by said Court of Appeals; and I further certify that the papers herewith sent, numbered from one up to —, are all the original papers and pleadings filed in the above cause of The Cuyahoga

River Power Company Plaintiff in Error, against The Northern Realty Company Defendant in Error.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Common Pleas Court on this 15th day of May A. D. 1914.

[Seal Common Pleas Court of the County of Summit, Ohio.]

BERT C. GARMAN. *Clerk,*
By M. CRUMB, *Deputy.*

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

[Endorsed:] No. 80. Dec. —. Page —. Common Pleas Court, Summit County, O. The Cuyhoga River Power Company, Plaintiff in Error, vs. The Northern Realty Company, Defendant in Error. Willis Bacon, Tiffin, Ohio, and D. C. Westenheaver, Cleveland, O., Plaintiff's Attorneys. Rowley, Mather & Eagleson, Defendant's Attorneys. Transcript of Docket and Journal Entries. Filed Court of Appeals May 15, 1914. Summit County, Ohio. Bert C. Garman, Clerk.

639 In the Court of Appeals.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

STATE OF OHIO,
Summit County, ss:

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff in Error,
vs.
THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendants in Error.

Petition in Error.

Plaintiff in error says that at the April Term, 1914, of the Court of Common Pleas of Summit County, defendants in error recovered a judgment by the consideration of said Court, against plaintiff in error in an action then pending therein, wherein plaintiff in error was plaintiff, and defendants in error were defendants, a transcript of the docket and journal entries whereof are filed herein.

There is error in the said record and proceedings in this, to wit:

First. Said Court erred in sustaining the motion of defendants in error to dismiss said case.

Second. Said Court erred in the admission of the evidence of said The Northern Realty Company and said The Northern Ohio Trac-

ion & Light Company, to which the said The Cuyahoga River Power Company objected.

Third. Said Court erred in ruling out the evidence offered by said The Cuyahoga River Power Company, to which the said The Cuyahoga River Power Company excepted.

Fourth. Said ruling of said Court was contrary to Law, and contrary to the evidence introduced.

Fifth. The ruling of said Court was against the weight of the evidence introduced in said case.

640 Sixth. Said Court erred in holding that the description of the property which plaintiff in error sought to condemn, was insufficient.

Seventh. Said Court erred in granting the motion of defendants in error in that said decision is in violation of the rights secured to the plaintiff in error by Article I, Section 10, of the Constitution of the United States, which provides that no State shall pass any Law impairing the obligation of contracts.

Eighth. Said Court erred in that its decision violates the rights guaranteed to the plaintiff in error by the Fourteenth Amendment of the Constitution of the United States, Section 1, which provides that no State shall deprive any person of life, liberty or property without due process of Law; nor deny to any person within its jurisdiction the equal protection of the Laws.

Ninth. Said Court erred in that its decision violates the rights of plaintiff in error, guaranteed to it by the Constitution of the State of Ohio, Article II, Section 28, which provides that the General Assembly shall have no power to pass Laws impairing the obligation of contracts.

Tenth. Said Court erred in that its decision violates the rights of plaintiff in error, guaranteed to it by Article I, Section 19 of the Constitution of the State of Ohio, which says that private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Eleventh. Said Court erred in holding that proper offers for said property were not made.

641 Twelfth. Said Court erred in holding that the evidence did not show that plaintiff in error proved inability to agree.

Thirteenth. Said Court erred in holding that the property of said defendants in error had been dedicated to public use.

Fourteenth. Said Court erred in giving a judgment for said defendants in error, when it ought to have been given for said plaintiff in error.

Plaintiff in error therefore prays that said judgment may be re-

versed, and that it may be restored to all things it has lost by reason thereof.

WILLIAM Z. DAVIS,
JOHN FRANK,
ENGLANDER & BOWDEN,
WILLIS BACON,
COLLIN, WELLS & HUGHES,
Attorneys for Plaintiff in Error.

642 STATE OF OHIO,
Summit County, ss:

In the Court of Appeals.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff in Error,
vs.
THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendants in Error.

Precipe.

To the Clerk of said Court:—

Please issue summons in error to the Sheriff of said County, directed to Rowley, Mather and Eagleson, and Roy Nesbit, Attorneys for defendants in error.

WILLIAM Z. DAVIS,
JOHN FRANK,
ENGLANDER & BOWDEN,
WILLIS BACON,
COLLIN, WELLS & HUGHES,
Attorneys for Plaintiff in Error.

643 [Endorsed:] 16979. #80. State of Ohio, Summit County, ss: In the Court of Appeals. The Cuyahoga River Power Company, Plaintiff in Error, vs. The Northern Realty Company et al., Defendants in Error. Petition in Error. Filed Court of Appeals, Summit County, Ohio, May 15, 1914. Bert C. Garman, Clerk. Englander & Bowden, Attorneys-at-Law. Leader-News Bldg. Cleveland. Filed Supreme Court of Ohio, Feb. 4- 1915. Frank McKean, Clerk.

644 *Mandate from the Court of Appeals.*

General Code, Sec. 12240.

THE STATE OF OHIO,
Summit County, Court of Appeals:

At a term of the Court of Appeals, within and for the County of Summit in the State of Ohio, begun and held before Hon. [illegible] H. Winch, Hon. W. D. Meals, Hon. C. R. Grant, Presiding Judges, at Akron, Ohio, on the 16th day of Sept. A. D. 1914, among other proceedings then and there had by and before said Court, as appears by its Journal, were the following, viz:

No. 80.

THE CUYAHOGA RIVER POWER COMPANY
vs.
THE NORTHERN REALTY COMPANY et al.

This cause came on to be heard upon the petition in error, bill of exceptions, original papers and pleadings, and the transcript of the record in the Court of Common Pleas, and was argued by counsel and submitted to the court; on consideration whereof the judgment of said Court of Common Pleas is affirmed, there being, however, in the opinion of the court, reasonable ground for this proceeding in error.

It is therefore considered that said defendant in error recover of said plaintiff in error its costs herein.

Ordered that a special mandate be sent to the Common Pleas Court to carry this judgment into execution.

To which judgment and order of the court and to each and every part thereof, plaintiff in error here and now duly excepts.

Ordered that a special Mandate be sent to the Court of Common Pleas of said County to carry this judgment into execution.

Ordered that a copy of this entry be certified to the Clerk of the Court of Common Pleas of said County for entry, etc.

I, Bert C. Garman, Clerk of the Court of Appeals of Ohio, within and for Summit County, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said Court.

Witness my hand and the seal of said Court, this 29 day of Jan. 1915.

[Seal Court of Appeals, Summit County, Ohio.]

BERT C. GARMAN,
Clerk of Court of Appeals,
By M. CRUMB, *Deputy.*

645 [Endorsed:] J. C. 1-150. No. 80, Ct. of App'l. No. — C. P. Ct. Court of Appeals, Summit County, O. The Cuyahoga River Power Co., vs. The Northern Realty Co. et al. Mandate. Filed Jan. 27, 1915. Court of Appeals, Summit County, Ohio, —— ——, Clerk.

646 Copy.

Filed Jan. 9, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

Supreme Court of Ohio.

#14803.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
v.
THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendants.

Motion to Direct the Court of Appeals of Summit County to Certify — in this Case to the Supreme Court.

The plaintiff, The Cuyhoga River Power Company, a corporation existing under and by virtue of the laws of Ohio, moves this court for an order directing the Court of Appeals of Summit County to certify its record in the above entitled case to the Supreme Court of Ohio for review for the reasons following, to wit:

First. All of the questions involved in this case relate to the proper application of the law of eminent domain where there are conflicting claims of different corporations; and the same have not been provided for by statute, nor specifically settled by decision of the courts of Ohio. Therefore they are of public interest and of great general interest in that the answer thereto would define corporate rights which have been conferred by general statutes enacted by the General Assembly of Ohio.

Second. Some of the questions submitted in the record of this case are as follows:

1. Do the rights and privileges conferred upon a corporation by the state of Ohio constitute a contract, the obligation of which cannot be impaired?

2. What estate and priority, if any, does a corporation acquire which first makes a preliminary survey, adopts a plan or
647 route and formally locates the same by resolution of its board of directors?

3. Can a public utilities corporation owning land as private property, devote the same to a use public in its nature, but for which use such corporation would have no authority to appropriate or condemn the same, so as to defeat appropriation proceedings by another corporation expressly authorized by statute to exercise the power of eminent domain?

4. If so, can a public service corporation so devote its private property to such use as to defeat appropriation proceedings by another corporation expressly authorized by statute to exercise the power of eminent domain, when such appropriation proceedings were begun before the actual attempt to devote the land to the

ner use, or when the appropriating corporation had already acquired a right by a formal location over and upon the land?

5. What is a "devotion" to a public use; and can there be such a devotion of private property, other than by condemnation, or possibly by a formal dedication to the public in writing so that the user cannot be withdrawn and the property revert to private ownership?

6. To put a question in concrete form, the facts appearing in this record: Can an interurban electric railway, the defendant company, The Northern Ohio Traction & Light Company, which purchases land and holds and treats the same as private property for a long series of years, be permitted, after proceedings begun to appropriate the land for hydro-electric purposes by the plaintiff, The Cuyahoga River Power Company, of which The Northern Ohio Traction & Light Company had full notice, to build a power
648 house on said land and thereby to defeat the appropriation by the plaintiff, The Cuyahoga River Power Company?

7. The Court of Common Pleas and the Court of Appeals held that The Northern Ohio Traction & Light Company might lawfully do as stated in question 6 above, and that therefore The Cuyahoga River Power Company has no right to appropriate the land. And therefore, again, is not this result an impairment of the obligation of the contract between the state and this plaintiff; and again, is not this result attained without due process of law?

8. Hence we claim that this case involves questions under the Constitution of the United States and the Constitution of Ohio.

9. Besides error in the judgment, numerous errors in the admission of evidence appear in the Bill of Exceptions.

The plaintiff therefore moves the court for an order requiring the Court of Appeals of Summit County to certify its record in said case to this court for review.

W. Z. DAVIS,
COLLIN, WELLS & HUGHES,
FRANK & REAM,
WILLIS BACON,
Attorneys for Plaintiff.

649 Copy.

Filed Jan. 12, 1915, Supreme Court of Ohio. Frank E. McKean Clerk.

Supreme Court of Ohio.

#14803.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,

v.

THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendants.

Notice of Motion.

The plaintiff hereby gives notice to the defendants that on Thursday January 21, 1915, at 9:00 o'clock A. M., or as soon thereafter as counsel can be heard, the plaintiff will apply to the Supreme Court of Ohio at their rooms in Columbus, for an order directing the Court of Appeals of Summit County to certify its record in the above entitled case, for review by the said Supreme Court of Ohio.

W. Z. DAVIS,
COLLIN, WELLS & HUGHES,
FRANK & REAM,
WILLIS BACON,
Attorneys for Plaintiff.

Service of the above by copy acknowledged, and also copy of Motion received this 11th day of January, 1915.

ROGERS, MATHER & NESBITT,
Att'ys for Defendants.

650 & 651 THE STATE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio do hereby certify that the foregoing is a true and correct copy of the Motion to direct the Court of Appeals of Summit County to certify its record to the Supreme Court of Ohio, and notice thereof, in case No. 14803, The Cuyahoga River Power Company, Plaintiff in Error, vs. The Northern Realty Company and The Northern Ohio Traction & Light Company, defendants in error, said motion being filed in said Court on the 9th day of January A. D. 1915, and said notice being filed in said Court on the 12th day of January, 1915, said motion and notice being now lodged in my office.

In Witness Whereof, I have hereunto subscribed my name and

affixed the Seal of said Supreme Court of Ohio, this 3rd day of January, A. D. 1916.

[The Seal of the Supreme Court of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

United States internal revenue documentary stamp, series of 1914, ten cents, cancelled 1/3/16. McKean.

652 In the Supreme Court of Ohio.

No. 14803.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff in Error,
v.
THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendants in Error.

Petition in Error.

Filed Feb. 4, 1915. Supreme Court of Ohio, Frank E. McKean, Clerk.

Plaintiff in error says that on the 27th day of January, 1915, in the Court of Appeals in and for Summit County, Ohio, defendants in error recovered a judgment by the consideration of said court, against plaintiff in error in an action then pending therein, wherein plaintiff in error was plaintiff, and defendants in error were defendants. A transcript of the docket and journal entries whereof, the Bill of Exceptions, and such other original papers as are necessary to show the errors complained of, are filed herein.

There is error in the said record and proceedings, in this, to-wit:

First. Said court erred in that said judgment is in violation of the rights secured to the plaintiff in error by Article I, section 10, of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts.

Second. Said court erred in that its said judgment violates the rights guaranteed to the plaintiff in error by the Fifth Amend-
653 ment to the Constitution of the United States, and also the Fourteenth Amendment to the Constitution of the United States, Section I, which provides that no State shall deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws; and also violates Article I, section 16, of the Constitution of Ohio.

Third. Said court erred in that its said judgment violates the rights of plaintiff in error, guaranteed to it by the Constitution of the State of Ohio, Article II, section 28, which provides that the

General Assembly shall have no power to pass laws impairing the obligation of contracts.

Fourth. Said court erred in that its said judgment violates the rights of plaintiff in error, guaranteed to it by Article I, section 19, of the Constitution of the State of Ohio, which says that private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads which shall be open to the public, without charge, a compensation shall be made to the owner, in money; and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Fifth. Said court erred in holding that the property of said defendants in error had been dedicated to public use.

Sixth. Said court erred in holding that the evidence did not show that plaintiff in error proved inability to agree.

654 Seventh. Said court erred in rendering a judgment for said defendants in error when it ought to have been given for said plaintiff in error.

Eighth. Said court erred in the admission of the evidence of said The Northern Realty Company and said The Northern Ohio Traction and Light Company, to which the said The Cuyahoga River Power Company objected.

Ninth. Said court erred in ruling out evidence offered by the said The Cuyahoga River Power Company, to which ruling the said The Cuyahoga River Power Company excepted.

Tenth. Said ruling of said court was contrary to law, and contrary to the evidence introduced.

Eleventh. The ruling of said court was against the weight of the evidence introduced in said case.

Twelfth. Said court erred in holding that the description of the property which plaintiff in error sought to condemn was insufficient.

Plaintiff in error therefore prays that said judgment may be reversed, and that it may be restored to all things it has lost by reason thereof.

W. Z. DAVIS,
COLLIN, WELLS & HUGHES,
FRANK & REAM,
WILLIS BACON,
Attorneys for Plaintiff in Error.

We hereby waive the issue and service of summons in error in the above entitled case, and enter the appearance of defendants hereto this 3rd day of February, 1915.

ROGERS, MATHER & NESBITT,
Att'ys for Def't in Error.

55 & 656 STATE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio do hereby certify that the foregoing is a true and correct copy of the Petition in Error in case No. 14803 The Cuyahoga River Power Company, plaintiff in error, vs. The Northern Realty Company and The Northern Ohio Traction & Light Company, Defendants in Error, filed in said Court on the 4th day of February A. D. 1915, and now lodged in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio, this 3rd day of January, A. D. 1916.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 1/3/16. McKean.]

57 In the Supreme Court of Ohio.

No. 14803.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff in Error,
vs.
THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendants in Error.

Motion to Dismiss Petition in Error.

Filed Feb. 24, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

Now come Defendants in Error and move the Court to dismiss the petition in error of Plaintiff in Error herein for the following reasons, to-wit:

I.

The judgment of the Court of Appeals in this case was final.

II.

This is not a case involving a question under the Constitution of the United States or of this State.

III.

That it is not a case of public or great general interest in which this Court may direct the Court of Appeals to certify its record to this Court.

IV.

That this Court has not jurisdiction of the action.

ROGERS, MATHER & NESBITT,
Attorneys for Defendants in Error.

658 In the Supreme Court of Ohio.

#14803.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff in Error,
vs.
THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendants in Error.

Notice of Motion.

Filed Feb. 24, 1915. Supreme Court of Ohio. Frank E. McKean Clerk.

Defendants in Error hereby give notice to Plaintiff in Error tha they have filed their motion in the above entitled cause, asking th Court to dismiss the petition in error of Plaintiff in Error, and tha said motion will be heard in said Court on Thursday, the 11th day o March, A. D. 1915, at nine o'clock A. M., or as soon thereafter a the attention of the Court can be obtained.

A copy of said motion is hereto attached.

ROGERS, MATHER & NESBITT,
Attorneys for Defendants in Error.

Service of the above notice by copy acknowledged, and also cop of motion received this 24th day of February, A. D. 1915.

W. Z. DAVIS,
COLLIN, WELLS & HUGHES,
WILLIS BACON,
Attorneys for Plaintiff in Error.

659 THE STATE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State o Ohio do hereby certify that the foregoing is a true and correct cop of the Motion to dismiss petition in error and notice of motion t dismiss petition in error in case No. 14803, The Cuyahoga Rive Power Company, Plaintiff in Error, vs. The Northern Realty Com pany and The Northern Ohio Traction & Light Company, defend ants in error, filed in said Court on the 24th day of February A. D 1915, and now lodged in my office.

In witness whereof, I have hereunto subscribed my name an

affixed the Seal of said Supreme Court of Ohio, this 3rd day of January, A. D. 1916.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

United States internal revenue documentary stamp, series of 1914, ten cents, cancelled 1-3-16. McKean.

660 ——

661 Supreme Court of the State of Ohio, of the Term of January, A. D., 1915.

Towit: Tuesday, March 23rd.

STATE OF OHIO,
City of Columbus:

No. 14803.

THE CUYAHOGA RIVER POWER COMPANY
vs.
THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION AND LIGHT COMPANY.

Error to the Court of Appeals, Summit County.

This cause came on to be heard upon the motion of the plaintiff, The Cuyahoga River Power Company, for an order directing the Court of Appeals of Summit County to certify its record in the above entitled case to the Supreme Court of Ohio for review, for reasons stated in said motion; and it appearing that said plaintiff claims in said motion that said record involves questions arising under the Constitution of the State of Ohio and the Constitution of the United States, the said plaintiff filed in this Court its petition in error in said case as a matter of right, according to the practice of this court; and thereupon this cause came on to be heard on the motion of the defendants to dismiss said petition in error on the ground that said cause does not involve any question arising under the constitution of Ohio or the Constitution of the United States and that the same is not a case of public or great general interest, together with said motion of plaintiff for an order directing the said Court of Appeals to certify its record in said cause to this court for review, and said motions were argued by counsel and submitted to the court and the court having considered the same does find that this Court is without jurisdiction in the premises, said cause being neither one of public or great general interest, nor does it involve any question arising under the Constitution of the United States or the State of Ohio.

It is, therefore, ordered and adjudged that said motion to dismiss said petition in error be, and it is hereby, sustained, and said petition

in error is dismissed; and that the said motion to direct the Court of Appeals to certify its record to this Court be, and it is hereby, overruled.

It is further ordered that defendants in error recover from plaintiff in error their costs herein, expended, taxed at $—.

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Records of said Court, to-wit: from Journal No. 27 Page 65.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 30th day of March, A. D. 1915.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN, *Clerk.*
By SEBA H. MILLER, *Deputy.*

Cost bill on other side.

Supreme Court Cost Bill.

Petition in error $5.00, paid by Wm. Z. Davis.
Motion, $2.00, paid by Wm. Z. Davis.
Motion, $2.00, paid by Rogers, Mather & Nesbitt.

[Endorsed:] C. of Appeals. #80. Jl. 1-158. Supreme Court of the State fo Ohio. No. 14803. The Cuyahoga River Power Co. vs. The Northern Realty Co. et al. Certified copy of entry. Filed, Court of Appeals, Apr. 10, 1915. Summit County, Ohio. —— ——, Clerk. Rec'd 4/10/15.

662 Court of Appeals of the State of Ohio, Eighth District.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff-in-Error,
against
THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendants-in-Error

Know All Men by These Presents, That the undersigned National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City of New York, County and State of New York, is held and firmly bound unto The Northern Realty Company and The Northern Ohio Traction & Light Company in the just and full sum of Five Hundred ($500.00) Dollars, to be paid to said The Northern Realty Company and The Northern Ohio Traction & Light Company, their successors or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents. Sealed with our seals and dated this 10th day of September, 1915.

Whereas, the above named The Cuyahoga River Power Company

has prosecuted a writ of error from the Supreme Court of the United States to the Court of Appeals of the State of Ohio in and for the Eighth District to reverse the order and judgment of said Court of Appeals in the above entitled cause.

Now, Therefore, the condition of this obligation is such, that if the above named The Cuyahoga River Power Company shall prosecute its said writ to effect and answer all costs if it fail to make good its plea then this obligation shall be void, otherwise to remain in full force and effect.

[Seal National Surety Company, New York. Incorporated, 1897.]

NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
Resident Vice President.

Attest:

N. V. TYNAN,
Resident Ass't Secretary.

663 STATE OF NEW YORK,
County of New York, ss:

On this 10th day of September, 1915, before me personally appeared Wm. A. Thompson, Resident Vice-President of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the County of New York; that he is the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Resident Vice-President of said Company by like authority, and that the liabilities of said Company do not exceed its assets as determined by an audit of the Company's annual statement filed with the Superintendent of Insurance of the State of New York and certified to by said Superintendent, pursuant to section 2 of chapter 182 of the Laws of the State of New York for the year 1913, amending section 182 of chapter 33 of the Laws of the State of New York for the year 1909, constituting chapter 28 of the Consolidated Laws of the State of New York. And said Wm. A. Thompson further said that he is acquainted with N. V. Tynan and knows him to be the Resident Assistant Secretary of said Company; that the signature of the said N. V. Tynan subscribed to the said instrument is in the genuine handwriting of the said N. V. Tynan and was thereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Resident Vice-President.

[Seal H. E. Emmett, Notary Public, Kings County.]

H. E. EMMETT,
Notary Public for Kings County No. 3.

Certificate filed in New York County, No. 2, Nassau, Bronx, Queens Richmond and Westchester Counties, Kings County Register's Office No. 6002, New York County Register's Office No. 6003. Bronx County Register's Office No. 6004.

Copy of By-Law.

Be it remembered: That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the sixth day of February, 1912, a quorum being present, the following By-Law was adopted:

Article XIII.

Section 1. Signatures required.—All bonds, recognizances, or contracts of indemnity, policies of insurance, and all other writings obligatory in the nature thereof, shall be signed by the President, a Vice-President, a Resident Vice-President, or Attorney-in-Fact, and shall have the seal of the Company affixed thereto, duly attested by the Secretary, an Assistant Secretary or Resident Assistant Secretary. All Vice-Presidents and Resident Vice-Presidents shall each have authority to sign such instruments, whether the President be absent or incapacitated, or not, and the Assistant Secretaries and Resident Assistant Secretaries shall each have authority to seal and attest such instruments, whether the Secretary be absent or incapacitated, or not; and the Attorneys-in-Fact shall each have authority, in the discretion of such Attorneys-in-Fact, to affix to such instruments an impression of the Company's seal, whether the Secretary be absent or incapacitated, or not, or to attach the individual seal of the Attorney-in-Fact thereto, or to use the scroll of the Attorney-in-Fact, or a wafer, wax, or other similar adhesive substance affixed thereto, or a seal of paper or other similar substance affixed thereto by mucilage, or other adhesive substance, or use the word "SEAL" or the letters "L. S." opposite the signature of such Attorneys-in-Fact, as the case may be.

STATE OF NEW YORK,
County of New York, ss:

I, N. V. Tynan, resident Assistant Secretary of the National Surety Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and the whole of said original By-Law.

Given under my hand and the seal of the Company in the County of New York, this 10th day of September, 1915.

[Seal National Surety Company, New York, Incorporated, 1897.]

N. V. TYNAN,
Resident Assistant Secretary.

664 [Endorsed:] — 80. Court of Appeals of the State of Ohio, Eighth District. The Cuyahoga River Power Company,

aintiff-in-error, against The Northern Realty Company, and The orthern Ohio Traction and Light Company, defendant-in-error. ond. Filed Court of Appeals Sep. 20, 1915, Summit County, Ohio, C. Garman, Clerk. Collin, Wells & Hughes, Attorneys for Plain- f in Error, Office & P. O. Address, 120 Broadway, Borough of Man- attan, New York City. Approved: Mahlon Pitney, Associate Jus- ce Supreme Court of the United States.

35 UNITED STATES OF AMERICA, *ss:*

o The Northern Realty Company and The Northern Ohio Traction and Light Company, Ohio corporations, Greeting:

You are hereby cited and admonished to be and appear at a Su- reme Court of the United States, to be held at Washington on the th day of October, 1915, pursuant to a writ of error filed in the ffice of the Clerk of the Court of Appeals of the State of Ohio, ighth District, wherein The Cuyahoga River Power Company is laintiff-in-error and you are defendants-in-error, to show cause, if ny there be, why the judgment herein against the said plaintiff-in- rror, as in the writ of error mentioned, should not be corrected, and hy speedy justice should not be done to the parties in that behalf. Witness the Hon. Mahlon Pitney, Associate Justice of the Supreme ourt of the United States, this 9th day of September, 1915.

MAHLON PITNEY,
Justice of the Supreme Court of the United States.

Service of the foregoing citation is hereby admitted this 20th day f September, 1915.

ROGERS, MATHER & NESBIT,
Attorney- for Defendants in Error.

366 [Endorsed:] 80. Court of Appeals of the State of Ohio, Eighth District. The Cuyahoga River Power Company, Plaintiff-in-Error, against The Northern Realty Company, and The Northern Ohio Traction & Light Company, Defendants-in-Error. Citation. Collin, Wells & Hughes, Attorneys for Plaintiff-in-Error. Office and P. O. Address, 120 Broadway, Borough of Manhattan, New York City. Filed Court of Appeals, Summit County, Ohio, Sep 20 1915. B. C. Garman, Clerk.

667 Court of Appeals of the State of Ohio, Eighth District.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff-in-Error,
against
THE NORTHERN REALTY COMPANY, and THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendants-in-Error.

Petition for a Writ of Error from the Supreme Court of the United States to the Court of Appeals of Ohio, Eighth District.

To the Honorable, the Judges of the Court of Appeals of Ohio, Eighth District:

Now comes The Cuyahoga River Power Company, plaintiff-in-error in the above entitled cause, and complains and alleges: Heretofore and on or about the 20th day of January, 1911, a petition was filed by this petitioner against the defendant-in-error, The Northern Realty Company, in the Probate Court of Summit County, Ohio, for the purpose of appropriating for a public use, in accordance with the statutes of Ohio in such cases made and provided, certain property which was deemed by said petitioner to be and was in fact necessary for the construction of a plant for the develop-
668 ment of hydro-electric power upon the Cuyahoga River in the State of Ohio, under and pursuant to a charter duly granted by the State of Ohio to said petitioner, by which charter said petitioner was authorized and empowered to construct the plant aforesaid and to acquire by an exercise of the power of eminent domain the property which it deemed necessary for that purpose.

Said petition duly proceeded to a trial or hearing, as provided by the statutes of Ohio, and such proceedings were had that the defendant-in-error, The Northern Ohio Traction and Light Company, appeared therein, and on or about the 27th day of January, 1915, the Court of Appeals of the State of Ohio, in and for the Eighth District, made and entered a final order and judgment against said petitioner, The Cuyahoga River Power Company, denying said petitioner's application for the appropriation of said property for the purposes aforesaid; and said Court of Appeals thereby made a decision against a right, title and privilege, specially set up and claimed by said petitioner in said proceeding, under the Constitution of the United States; and in said final order and judgment, and in the proceedings had prior thereto in said proceeding, certain errors were committed to the prejudice of the plaintiff-in-error herein, all of which will more in detail appear from the assignment of errors which is filed with this petition.

After the rendition of the order and judgment aforesaid, said petitioner, The Cuyahoga River Power Company, applied to
669 the Supreme Court of the State of Ohio for a writ of error to review said order and judgment of said Court of Appeals, but said Supreme Court of Ohio refused to grant said writ of error and refused to take jurisdiction of or hear or review said cause or

id judgment or order; and said judgment or order of said Court Appeals was and is a final order and judgment in the highest urt of the State of Ohio in which a decision could or can be had. Wherefore your petitioner, The Cuyahoga River Power Company, ays for the allowance of a writ of error from the Supreme Court the United States to said Court of Appeals of the State of Ohio id the judges thereof, to the end that the record in said cause may e removed into the Supreme Court of the United States and the ror complained of by your petitioner may be examined and cor-ected and said judgment or order reversed, and your petitioner re-ored to all things that it has lost by reason thereof; that the bond erewith presented be approved; and that a transcript of the record, roceedings and papers in said cause, duly authenticated, may be nt to the Supreme Court of the United States.

THE CUYAHOGA RIVER POWER COMPANY,
Petitioner.

By COLLIN, WELLS AND HUGHES,
Attorney-.

70 A writ of error as prayed for in the foregoing petition is hereby allowed this 9th day of September, 1915, and the ond for that purpose is fixed at $500.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

71 [Endorsed:] 80. Court of Appeals of the State of Ohio, Eighth District. The Cuyahoga River Power Company, Plaintiff-in-Error, against The Northern Realty Company, and The Northern Ohio Traction & Light Company, Defendants-in-Error. Petition for Writ of Error. Collin, Wells & Hughes, Attorneys for Plaintiff-in-Error. Office and P. O. Address, 120 Broadway, Bor-ough of Manhattan, New York City. Filed Court of Appeals, Sum-mit County Ohio, Sep 20 1915. B. C. Garman, Clerk.

672 Court of Appeals of the State of Ohio, Eighth District.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff-in-Error,
against
THE NORTHERN REALTY COMPANY, and THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendants-in-Error.

Writ of Error from the Supreme Court of the United States to the Court of Appeals of the State of Ohio, Eighth District.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable, the Judges of the Court of Appeals of the State of Ohio in and for the Eighth District of said State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Court of Appeals of the State of Ohio, in and for the Eighth District of said State, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit
673 between The Cuyahoga River Power Company and The Northern Realty Company and The Northern Ohio Traction and Light Company, wherein was drawn in question the validity of a statute of, or an authority exercised under, the United States of America and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State of Ohio, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute, or commission held under, the United States, and the decision was against the right, title, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; manifest error hath happened to the great damage of the said The Cuyahoga River Power Company, as by its complaint appears; and we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same
674 at Washington on the 8th day of October, 1915, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States the 9th day of September, 1915.

[Seal of the Supreme Court of the United States.]

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed September 9th, 1915.
MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

675 [Endorsed:] —. 80. Court of Appeals of the State of Ohio, Eighth District. The Cuyahoga River Power Company, Plaintiff-in-Error, against The Northern Realty Company, and the Northern Ohio Traction & Light Company, Defendants-in-Error. Filed Court of Appeals Sep. 20, 1915. Writ of Error. Summit County, Ohio. B. C. Garman, Clerk. Collin, Wells & Hughes, Attorneys for Plaintiff-in-Error, Office and P. O. Address, 120 Broadway, Borough of Manhattan, New York City.

676 Court of Appeals of the State of Ohio, Eighth District.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff-in-Error,
against
THE NORTHERN REALTY COMPANY, and THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendants-in-Error.

Assignment of Errors.

Now comes The Cuyahoga River Power Company, plaintiff-in-error, and respectfully submits that in the record, proceedings, and final order or judgment of the Court of Appeals of the State of Ohio in and for the Eighth District, in the above entitled cause, there is manifest error in this, to-wit:

(1) Said Court of Appeals erred in not deciding that the rights conferred on and acquired by the plaintiff-in-error by its acceptance of the charter granted to it by the State of Ohio and by its acts and proceedings under and by virtue of Sections 10128 to 10134 of the General Code of Ohio, of 1910, constitute a contract within the meaning of Section 10 of Article I of the Constitution of the United States, and constitute property within the meaning of the Fourteenth Amendment to said Constitution.

677 (2) Said Court of Appeals erred in not deciding that the plaintiff-in-error had and has a vested right to appropriate for its corporate purposes the parcel of land mentioned and described in its petition in said cause, which right was and is a contract right and a right of property within the meaning of Section 10 of Article I of the Constitution of the United States, and within the meaning of the Fourteenth Amendment to said Constitution.

(3) Said Court of Appeals erred in deciding that the parcel of land described in the petition in said cause had been devoted by the defendants-in-error to a public use, and the effect of such decision is to impair the obligation of the contract of the plaintiff-in-error with the State of Ohio and to take the property of the plaintiff-in-error without due process of law.

(4) The denial by said Court of Appeals of the plaintiff-in-error's petition for the appropriation of the parcel of land described in the petition in said cause, amounts to and effects and is a denial by the State of Ohio of an existing vested property right conferred upon the plaintiff-in-error by said State of Ohio, for which right the plaintiff-in-error had paid value and upon the faith of which it had invested money and incurred obligations; and such denial amounts to and is an impairment of the obligation of the plaintiff-in-error's contract with the State of Ohio and results in depriving the
678 plaintiff-in-error of its property without due process of law and in depriving it of a right, privilege and immunity secured to it by the Constitution of the United States and in depriving it of the equal protection of the law as guaranteed to it by said Constitution.

(5) In said cause there was erroneously admitted in evidence against the objection and exception of the plaintiff-in-error certain evidence tending to contradict and falsify certain deeds recorded upon the public records of the county wherein the parcel of land mentioned in the petition in said cause was located by showing that the Northern Realty Company was not the owner of the parcel of land mentioned in said petition at the time of the filing of said petition; and said Court of Appeals erred in not reversing the order or judgment of the trial court by reason of said error; and as a result of the erroneous admission of such evidence the plaintiff-in-error has been deprived of its right to appropriate said parcel for its corporate purposes and has been thereby deprived of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and has been denied the equal protection of the laws guaranteed to it by said Constitution. The parcel of land in question was conveyed to the Northern Realty Company by Henry A. Everett,, and upon the trial of said cause during the examination of a witness on behalf of the defendants-in-error the following occurred:

679 "Q. Do you know who paid the consideration——

(Objected to.)

for the property purchased at that time and deeded by Jeremiah Millbank, by his executor and executrix to Henry A. Everett?

Objected to.

The Court: How could you claim that was material?

Mr. Mather: We expect to show that the Northern Ohio Traction and Light Company has always owned this property. That it was not the property of the Northern Realty Company; that it was purchased originally by the Akron, Bedford and Cleveland Rail-

ad Company and that Henry A. Everett was the bare and naked
ıstee of the legal title. That later the Northern Ohio Traction
Light Company succeeded to all the property rights of The Akron
edford and Cleveland, and owned this property long before this
it was instituted, and will follow that up by development of this
entical property, for identically the same purpose for which they
e seeking to appropriate it. The property was never conveyed by
enry A. Everett until he conveyed it less than a month before this
it was commenced.

The Court: You may answer the question.

Plaintiff excepts.

A. The property was paid for by the A. B. C. Railroad.

Mr. Mather:

Q. By the A. B. C. Railroad, you mean what?

A. The Akron Bedford and Cleveland Railroad.

80 Judge Davis: We don't want to interpose an objection to every question. We wish it understood we object to this hole line of this testimony, and have our exception.

The Court: Yes."

(6) In said cause there was erroneously admitted in evidence gainst the objection and exception of the plaintiff-in-error certain vidence tending to show that subsequent to the filing of the plain-iff-in-error's petition in said cause the defendant-in-error The Northern Ohio Traction and Light Company claiming to act under egal authority vested in it by the State of Ohio (but in fact without uch legal authority) had utilized the parcel of land described in he petition in said cause in connection with a power plant, which tilization was claimed to be for a public use of the same character s that for which the plaintiff-in-error seeks to appropriate said par-el of land; and said Court of Appeals erred in not reversing the rder or judgment of the trial court by reason of said error; and as result of the erroneous admission of such evidence the plaintiff-n-error has been deprived of its right to appropriate said parcel or its corporate purposes and has been thereby deprived of its roperty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and has been denied the equal protection of the laws guaranteed to it by said Con-titution.

Upon the trial of said cause during the examination of a
81 witness on behalf of the defendant-in-error the following occurred:

"Q. Now Mr. Lahr, what expenditures, if any, have been made by the Northern Ohio Traction and Light Company in the aggregate in the development of the Gorge property for power purposes, both as to steam and hydroelectric plants, and all appurtenances?

Objected to.

Mr. Frank: I wish to direct the attention of the Court to a ques-tion which was raised by the stenographer. The court has said

we might have our objection and exception to all of this line of testimony, but the stenographer says that without your specific direction he won't put in the respective objections after the questions.

The Court: Give them an objection and exception to all this line of examination.

Stenographer: Insert it in the record?

The Court: Yes to this line of examination with reference to what has been done since the petition has been filed in the case.

Mr. Frank: And the ownership of this property by the traction company?

The Court: Yes, you may have your exception to that too.

Mr. Mather:

Q. What do you say Mr. Lahr?

Objected to—objection overruled—plaintiff excepts.

682 A. The expenditures up to January 1, 1914, were $1,979,549.68.

Q. That included only the development of the property?

Objected to—objection overruled—plaintiff excepts.

A. That included the power station.

Q. Both power houses?

Objected to—objection overruled—plaintiff excepts.

A. Yes.

Q. And the dam?

Objected to—objection overruled—plaintiff excepts.

A. Yes.

Q. And the flume?

Objected to—objection overruled—plaintiff excepts.

A. Yes, everything.

Q. Does it include transmission lines?

Objected to—objection overruled—plaintiff excepts.

A. Yes, sir, and sub stations."

(7) The operation and effect of said order or judgment is to authorize and allow the defendants-in-error to take the property of the plaintiff-in-error for a private use and without compensation in violation of the Constitution of the United States and further violates said Constitution in that it makes the parcel of land involved in his cause paramount to instead of subservient to the public welfare and makes it not subject to the power of eminent domain, to which power all property is subject by the terms and intent of said Constitution.

683 (8) Said order or judgment is indisputably contrary to the evidence and without any evidence to support it and was made arbitrarily and in such manifest abuse of power as to make it wholly void as having been made without due process of law.

(9) Said Court of Appeals erred in giving judgment for defendants-in-error and in refusing to give judgment for the plaintiff-in-error.

Wherefore, and for divers other reasons upon which the said judgment or order was made, the plaintiff-in-error prays that said judgment or order may be reversed, and that the plaintiff-in-error be restored to all things it has lost by reason thereof.

COLLIN, WELLS AND HUGHES,
Attorneys for Plaintiff-in-Error.

684 [Endorsed:] 80. Court of Appeals of the State of Ohio, Eighth District. The Cuyahoga River Power Company, Plaintiff-in-Error, against The Northern Realty Company, and The Northern Ohio Traction & Light Company, Defendants-in-Error. Assignment of Errors. Filed Sep. 21, 1915. Court of Appeals, Summit County, Ohio. B. C. Garman, Clerk. Collin, Wells & Hughes, Attorneys for Plaintiff-in-Error, Office and P. O. Adress, 120 Broadway, Borough of Manhattan, New York City.

685 Summit County, Court of Appeals.

Docket and Journal Entries.

May 15, 1914. Petition in Error, Precipe, Transcript of Common Pleas Court, Petition in Error, Precipe, Transcript of Probate Court, Summons, Depositions for Plaintiff, Motion, Def't, Bond, Bill of Exceptions, 3 Journal Entries filed.

May 15, 1914. Summons in Error issued to Sheriff Fergusson.

May 19, 1914. Summons in Error returned, "and I served the same on May 18, 1914, by personally handing a true and certified copy of this writ to Roy Nesbitt and by delivering a like copy to Freeman T. Eagleson of the partnership of Rowley, Mather & Eagleson. David R. Fergusson, Sheriff."

March Term, 1914. The plaintiff on its application has leave by July 15th, to file brief in reply to defendant's brief. Jl. 1-107.

May 28, 1914. 3 Briefs, Plaintiff in Error, filed.

June 25th, 1914. 3 Briefs, Defendant in Error, filed.

June 25th, 1914. Acceptance of Copy, filed.

August 11, 1914, plaintiff's Brief in Reply, 4 copies, filed.

Sept. Term, 1914. This cause came on to be heard upon the petition in error, bill of exceptions, original papers and pleadings, and the transcript of the record in the court of common Pleas, and was argued by counsel and submitted to the court; on consideration whereof the judgment of said court of Common Pleas is affirmed, there being, however, in the opinion of the court, reasonable ground for this proceeding in error. It is therefore considered that said defendant in error recover of said plaintiff in error its costs herein. Ordered that a special mandate be sent to the Common Pleas Court to carry this judgment into execution. To which judgment and

order of the court and to each and every part thereof plaintiff in error here and now duly excepts. Jl. 1-150.

January 29, 1915. Transcript and original papers taken to Supreme Court.

April 14, 1915. This cause came on to be heard upon the motion of the plaintiff, The Cuyahoga River Power Company, for an order directing the Court of Appeals of Summit County to certify its record in the above entitled case to the Supreme Court of Ohio, for review, for reasons stated in said motion; and it appearing that said plaintiff claims in said motion that said record involves questions arising under the Constitution of the State of Ohio and the Constitution of the United States, the said plaintiff filed in this Court its petition in error in said case as a matter of right according to the practice of this court; and thereupon this cause came on to be heard on the motion of the defendants to dismiss said petition in error on the ground that said cause does not involve any question arising under the constitution of Ohio or the Constitution of the United States and that the same is not a case of public or great general interest, together with said motion of plaintiff for an order directing the said court of Appeals to certify its record in said cause to this Court for review, and said motions were argued by counsel and submitted to the court and the court having considered the same does find that this court is without jurisdiction in the premises, said cause being neither one of public or great general interest, nor does it involve any question arising under the Constitution of the United States or the State of Ohio. It is, therefore, ordered and adjudged that said motion to dismiss said petition in error, be and it is hereby, sustained, and said petition in error is dismissed;
686 and that the said motion to direct the Court of Appeals to certify its record to this court be, and it is hereby, overruled. It is further ordered that defendants in error recover from plaintiff in error their costs herein, expended, taxed at $—.

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Records of said court, to-wit: From Journal No. 27, page 65.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of said Supreme Court this 30th day of March, A. D., 1915. Frank E. McKean, Clerk, By Seba H. Miller, Deputy. (Seal). Jl. 1-158.

Sept. 20, 1915. Petition for Writ of Error, Writ of Error, Assignment of Error, Bond, and Citation, filed.

687 STATE OF OHIO,
Summit County, ss:

I, Bert C. Garman, Clerk of the Court of Appeals of the County of Summit and State of Ohio, Eighth District, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing contains a true and complete transcript of the record and of all proceedings in the case of The Cuyahoga River Power

Company, Plaintiff-in-Error, against The Northern Realty Company and The Northern Ohio Traction and Light Company, Defendants-in-Error, and all of the original pleadings and papers and processes as the same remain of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Akron, Ohio, this 13 day of November, A. D. 1915.

[Seal Court of Appeals, Summit County, Ohio.]

BERT C. GARMAN,
Clerk of said Court of Appeals of Summit County, Eighth Dist. of Ohio.

Endorsed on cover: File No. 25,078. Ohio Court of Appeals, Eighth District. Term No. 342. The Cuyahoga River Power Company, plaintiff in error, vs. The Northern Realty Company and The Northern Ohio Traction & Light Company. Filed January 8th, 1916. File No. 25,078.

FILED
FEB 26 1917
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1916

No. 342.

THE CUYAHOGA RIVER POWER COMPANY,
Plaintiff-in-Error

against

THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION & LIGHT COMPANY,
Defendants-in-Error.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO

BRIEF FOR PLAINTIFF-IN-ERROR

WILLIAM Z. DAVIS, Columbus, O.
JOHN L. WELLS,
CARROLL G. WALTER, } New York
Counsel for Plaintiff-in-Error

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Supreme Court of the United States,

OCTOBER TERM, 1916.

THE CUYAHOGA RIVER POWER COMPANY, *Plaintiff-in-Error,* *against* THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION AND LIGHT COMPANY, *Defendants-in-Error.*	No. 342.

ERROR OF THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

BRIEF FOR PLAINTIFF-IN-ERROR.

Statement of the Case.

This is a writ of error to review a judgment of the State Court denying and depriving the plaintiff-in-error of its right to acquire, by an exercise of the power of eminent domain duly granted to it by the State, a parcel of land needed by it for the construction and maintenance of a hydro-electric plant upon the Cuyahoga River in the State of Ohio.

The record is large, and, by reason of the absence of any findings or opinions, is somewhat in need of elucidation. But stripped of its mass of unimportant detail the situation it presents is simply this: The plaintiff-in-error

being duly organized as a corporation with the power of eminent domain commenced this proceeding against The Northern Realty Company to acquire the land in question. Subsequently, and during the pendency of the proceeding, the land was conveyed to The Northern Ohio Power Company, a "dummy" of The Northern Ohio Traction and Light Company, and in its name and under its charter there were erected upon the land a dam and two power plants, which, at the time of the trial, were claimed to be owned by the Traction Company and were being utilized for the generation of power for use in the Traction Company's business. By other decisions of the Supreme Court of Ohio it is settled that this "dummy" had no power to appropriate property for a public use or even exist as a corporation. But the State court in this case gave effect to the claim that the subsequent steps mentioned above constituted a devotion of the land to a public use, and held that by reason of such devotion the plaintiff-in-error could not acquire the land. These subsequent steps in large part, were taken after the Ohio Public Service Commission Act became effective on June 30, 1911, three years after the plaintiff-in-error obtained its charter, and were necessarily governed by that subsequent statute, to which the State court necessarily gave effect.

The question here presented is whether the charter rights of the plaintiff-in-error can be thus defeated consistently with the Federal Constitution.

It was specially set up and claimed below that under a contract with the State, resulting from its acceptance of the State's grant, the plaintiff-in-error had a *vested right* to acquire the land in question and possess and utilize it in the construction and maintenance of its plant, and that

such right is a contract right and a right of property guaranteed it by the Constitution of the United States and the Fourteenth Amendment thereof.

It was further set up and claimed that the use asserted by the defendants-in-error is not a public use, and that if the alleged devotion were recognized and sustained it would constitute an impairment of the plaintiff-in-error's contract and a taking of its property for a private use and without compensation, in violation of its rights under the Constitution of the United States and the Fourteenth Amendment thereof.

Upon the ground that the State Court has denied the Federal rights so asserted and given effect to subsequent legislative action impairing the plaintiff-in-error's contract, the case is brought here under Section 237 of the Judicial Code, the writ of error having been allowed by Mr. Justice PITNEY on September 9, 1915.

In *Columbia Water Power Co.* v. *Columbia El. St. Ry. L. & P. Co.*, 172 U. S., 475, 487, 488, the statutory jurisdiction of this court over judgments of the State courts was analyzed as embracing three classes, viz.:

> "(1) 'Where is drawn in question the validity of a treaty, or statute of, or authority exercised under, the United States, and the decision is against their validity;'
>
> "(2) 'Where is drawn in question the validity of a statute of, or *an authority exercised under, any State* on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is *in favor of their validity;*'
>
> "(3) 'Or where *any title, right, privilege or immunity is claimed under the Constitu-*

tion, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is *against the title, right, privilege or immunity specially set up and claimed* by either party under such Constitution, statute, commission or authority.' "

The present case comes within both the second and third of these classes. The denial of the plaintiff-in-error's right to acquire the land is a decision against a title, right, privilege or immunity specially set up and claimed by the plaintiff-in-error under the Constitution of the United States, and is thus within the third class. The sustaining of the defendants-in-error's alleged devotion of the land to a public use is a decision in favor of an authority exercised under the State, the validity of which was drawn in question by the plaintiff-in-error on the ground that it was repugnant to the Constitution of the United States, and is thus within the second class.

Nature of the Proceeding.

Before entering upon a statement of the facts, the nature and character of the proceeding in which the judgment was rendered should be explained.

The Constitution of Ohio requires that the compensation to be paid for property taken for a public use shall be assessed by a jury (Article I, Section 19); and the statutes invest the Probate Courts with jurisdiction "to make inquests of the amount of compensation to be made to the owners of real estate appropriated by any corporation legally authorized to make such appropriation" (*Ohio General Code*, 1910, Section 10492).

The statutes further provide that when the taking is by a corporation, it shall file a petition with the Probate Judge of the county in which the property is situated, which petition may include any number of parcels in that county, but the owner of each parcel is entitled to a separate trial (*Id.* §§ 11042, 11043, 11048). After service of the summons, and preliminary to the impaneling of the jury, the Probate Judge is required to hear and determine four "preliminary" questions specified in the statutes, viz.: 1.—The existence of the corporation; 2.—Its right to make the appropriation; 3.—Its inability to agree as to the compensation to be paid for the property; 4.—The necessity for the appropriation. (Id. §§ 11039, 11046.)

If the judge determine these questions for the corporation, a jury is then impaneled and the compensation assessed. (Id. §§ 11047 *et seq.*)

A review of an adverse determination by the Probate Judge may be had in the higher courts. (*P. C. & T. R. R. Co.* v. *Tod*, 72 Ohio St., 156.)

The case at bar originated in a petition of the kind above described which was filed by the plaintiff-in-error in the Probate Court of Summit County.

The petition was filed on January 20, 1911, against The Northern Realty Company (Record, p. 2). Over three years were consumed in the disposition of various technical and dilatory motions. When, in March, 1914, the case finally came on for hearing upon the four questions above mentioned, The Northern Ohio Traction and Light Company was, upon its own motion, admitted as a party defendant (Rec., pp. 307, 20). It thereupon appeared and participated in the hearing through the same counsel who had theretofore represented the Realty Company.

The statutes do not provide for any pleadings other than the petition, nor for the framing of any issue, but at the opening of the case counsel for the defendants stated (Rec., p. 20):

> "Our defense is that this property is owned by The Northern Ohio Traction and Light Company, a public service corporation, and that the use which plaintiff seeks to make is entirely destructive of, and inconsistent with, the use for which it is required, and for which it has been developed, and is now being utilized by the owner."

After hearing evidence, the trial court dismissed the petition, thereby sustaining the defense thus stated and denying and depriving the plaintiff-in-error of its right to acquire the land; and the judgment under review is a judgment affirming that dismissal.

There are no findings of fact and no opinion or other statement of the grounds of the State Courts' decision.

Facts.

The plaintiff-in-error (hereinafter called the "plaintiff") was incorporated in 1908, under the laws of Ohio, particularly a statute enacted by the State Legislature in 1904 (Ohio Laws, Vol. 97, p. 300, formerly designated as Sections 3878 *et seq.* of the Revised Statutes, and now contained in Sections 10,128 to 10,134 of the Ohio General Code of 1910), the material portions of which are as follows:

> "SECTION 10128.—Any company or companies organized for the purpose of erecting or building dams across rivers or streams in this State to raise and maintain a head of water, or for constructing and maintaining

canals, locks, and race-ways to regulate and carry such head of water to any plant or power house where electricity is to be generated, or for erecting and maintaining a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity, or for transporting natural gas, petroleum, water or electricity, through tubing, pipes or conduits, or by means of wires, cables or conduits, or for storing, transporting or transmitting water, natural gas or petroleum, or for generating and transmitting electricity, *may enter upon any private land* for the purpose of examining or surveying a line or lines for its tubing, pipes, conduits, poles and wires, or for a reservoir, dams, canals, race-ways, plant or power house, and for ascertaining the number of acres overflowed by reason of the construction of such dam or dams, and MAY APPROPRIATE SO MUCH THEREOF AS IS DEEMED NECESSARY for the laying down or building of such tubing, conduits, pipes, dams, poles, wires, reservoir, plant and power house, as well as the land overflowed, and for the erection of tanks and reservoirs for the storage of water for transportation and the erection of stations along such line or lines, and the erection of such building as may be necessary for the purpose aforesaid.

"SECTION 10129.—Such appropriation shall be made in accordance with the law providing for compensation to the owners of private property appropriated to the use of corporations."

"SECTION 10132.—Such company or companies for the purpose of transporting natural gas, oils, water, and electricity shall be a common carrier, and subject to all the duties and liabilities of such carriers under the laws of this State."

This statute was construed and its validity upheld by the Supreme Court of Ohio in a case decided January 21, 1908, shortly prior to the plaintiff's incorporation, and it was then and there adjudicated, by the highest court of the State, that the use specified in the statute is a *public use*, and that corporations organized thereunder possess the power of eminent domain and have the right to appropriate such property as is necessary for their corporate purpose.

White v. *Little Miami Light, Heat & Power Co.*, 77 Ohio St., 633, affirming a judgment of the Circuit Court of Clermont County, which affirmed, upon the opinion of the Probate Court, a judgment of the Court of Common Pleas of that County affirming a judgment of the Probate Court of that County. See Opinion of Probate Court in 5 Ohio *Nisi Prius* Reports (N. S.) 204, printed also in the Appendix to this brief.

See, also:

Mt. Vernon Cotton Co. v. *Alabama Power Co.*, 240 U. S., 30, 32.

The plaintiff's articles of incorporation, filed on May 29, 1908, set forth its corporate purpose as follows:

> "Said corporation is formed for the purpose of acquiring, erecting, building, maintaining and operating dams *in the Big Cuyahoga River in the State of Ohio*, to raise and maintain a head of water; of constructing and maintaining canals, locks and raceways to regulate and carry said head of water to any plant or power house where electricity is to be generated; of erecting and maintain-

> ing a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity; of acquiring, producing, manufacturing, generating and selling electricity for light, heat, power and other purposes;" &c. (Rec., p. 21).

Section 8625 of the Ohio Code provides that, if the corporation be formed for a purpose which includes the construction of an improvement not to be located at a single place, the articles of incorporation must set forth the termini of the improvement and the counties in or through which it or its branches will pass. And in accordance with this provision the plaintiff's articles further state:

> "Said company's improvements are to begin at the confluence of the Big Cuyahoga River and the Little Cuyahoga River below the City of Akron, Summit County, Ohio, and extend along said Big Cuyahoga River through the County of Summit to a point where said Big Cuyahoga River crosses the line between Summit and Portage Counties." (Rec., pp. 21, 22).

The plaintiff's charter thus specifically locates its proposed plant *upon the Cuyahoga River between definitely fixed termini* and makes the river itself, between the specified *termini*, the plaintiff's *right of way*.

The filing of these articles of incorporation was followed on June 3, 1908, by the due organization of the corporation by subscriptions to its capital stock and the election of officers and a board of directors (Rec., pp. 30-35). And the settled law of Ohio is that on that date, at the latest, its corporate rights and powers *vested* and it then

became entitled to exercise all the rights and franchises specified in its charter.*

Among these rights and franchises, as appears from the statute and articles of incorporation quoted above, was the right or franchise of eminent domain for the appropriation of such lands as it deemed necessary for its corporate purpose.

After the election of the Board of Directors, and on June 3 and 4, 1908, the plaintiff, by resolution of its said Board, adopted a development plan made by its engineers, and it thereby *located* its proposed improvement upon definitely described parcels of land (Rec., pp. 35-37). This plan provided for the construction of a dam in the Cuyahoga River and other appliances for converting into electric energy the water power obtained from the fall of the waters of the river. The plaintiff also adopted a resolution setting forth the purpose of the company and stating *that "it is necessary and essential, for the purposes aforesaid, to appropriate and condemn, and this company does hereby appropriate and condemn, each and all of the following described real*

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* Corporations are formed in Ohio by the filing of articles of incorporation with the Secretary of State (*Ohio General Code*, §§ 8625, 8626). Upon such filing the persons who subscribed the articles, their associates, successors and assigns, are deemed a body corporate with power to act as pointed out in the statutes (*Id.*, § 8627; *Ashtabula & New Lisbon R. R. Co.* v. *Smith*, 15 Ohio St., 328); and in a number of cases the Supreme Court of the State has said that these powers fall into two classes—such as may be exercised before and such as cannot be until after the election of directors. "Among the former is the right to receive subscriptions to the capital stock, and the election of directors; and among the latter is the location and construction of the proposed road * * *. The condemnation of land for the construction of the road comes within the powers to be exercised by the corporation through its directors." *Powers* v. *R. R. Co.*, 33 Ohio St., 429, 432; *Ashtabula &c. R. Co.* v. *Smith*, 15 Ohio St., 328, 334. See, also, *Parkside Cemetery Association* v. *Cleveland, Bedford & Geauga Lake, Traction Co.*, 93 Ohio St., 161; 112 N. E., 596; *American Ball Bearing Co.* v. *Adams*, 222 Fed., 967, per Mr. JUSTICE CLARKE; *Kardo Co.* v. *Adams*, 231 Fed. 950 (C. C. A., Sixth Circuit) as to the necessity of subscriptions to stock and election of directors.

property and estate for the uses and purposes aforesaid.'' Then follow the descriptions of several parcels of land, including the land involved in this proceeding (Rec., pp. 36 and 130-137 where the descriptions are set forth).

On June 5, 1908, the plaintiff filed in the Probate Court of Summit County, Ohio, a petition for the appropriation of the various parcels described in this resolution, being, of course, the parcels necessary for it to acquire in order to construct its plant (Rec., pp. 128-139).

A part of the land described in that petition and in the plaintiff's said resolution then stood in the name of Henry A. Everett as the absolute fee simple owner thereof under a deed from the executors of one Jeremiah Milbank executed December 14, 1897, (Rec., pp. 118-121) and he was one of the persons who was made a party defendant to the petition (Rec., pp. 129, 131). The Northern Ohio Traction and Light Co., one of the defendants-in-error here, was likewise made a party defendant as a person who *claimed* the ownership of said parcel (Rec., pp. 130,131). The reason for this was that, while Everett denied that the Traction Company owned or had an interest in the land, other officers of the Company said that it had such an interest (Rec., pp. 48, 49).

Certain owners of *other parcels* of land described in the petition made defense thereto; and the case was carried by successive error proceedings to the Supreme Court of Ohio, where it was decided, in January, 1912, that the plaintiff's offers to purchase the lands of *such other owners* were invalid because such other owners were not given a sufficient time to consider them.

Big Cuyahoga L., H. & P. Co. v. *Turner, Vaughn & Taylor Co.*, 85 Ohio St. 482, affirming a judgment of the Circuit Court of Summit County rendered in October, 1909, and reported in 17 Ohio Cir. Ct. (N. S.) 34.

In the meantime, the land which had stood in Everett's name was conveyed by Everett to the defendant-in-error, The Northern Realty Company by an absolute deed dated December 20, 1910, in which occurs this statement:

> "To have and to hold the premises aforesaid, with the appurtenances thereunto belonging, to the said grantee (The Northern Realty Company), its successors and assigns, *so that neither the said grantor nor his heirs, nor any other persons claiming title through or under him, shall or will hereafter claim or demand any right or title to the premises, or any part thereof; but they and every one of them shall by these presents be excluded and forever barred*" (Rec., pp. 171, 122-126; particularly p. 126).

This deed was received for record December 22, 1910, and actually recorded January 10, 1911, (Rec., p. 126).

On January 20, 1911, the plaintiff instituted the proceeding which has resulted in the judgment now under review (Rec., pp. 2, 4-7); and the prior proceeding against Everett and The Northern Ohio Traction and Light Company was thereafter discontinued upon the plaintiff's own motion* (Rec., p. 3).

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*It must here be observed that neither Everett nor the Traction Company had joined with the owners of the other parcels in making defense to the first petition and they were not parties to the proceedings by which that petition was taken up to the Circuit and Supreme Courts as noted above.

The sole defendant named in the second petition was said Northern Realty Company (one of the defendants-in-error here which is hereinafter called "Realty Company"), to which the land had been thus conveyed by absolute fee simple deed. The summons upon the petition was duly served and the defendant appeared (Rec., pp. 2-9). Various motions of a technical and dilatory character were first made, among them being a motion to dismiss upon the ground of the pendency of another proceeding for the appropriation of the same property (meaning the petition filed in June, 1908, as above stated), which motion was overruled upon its being shown to the court that the former proceeding had been discontinued by the plaintiff (Rec., pp. 2-9). The Realty Company then raised the question that the description of the property contained in the petition was not a "specific description" as required by the statute. The Probate Court decided this question in its favor on the 11th day of May, 1911 (Rec., pp. 1, 4). The case was then taken, successively, to the Court of Common Pleas of Summit County, where the judgment of the Probate Court was affirmed (Rec., pp. 11, 12); then to the Circuit Court of Summit County, where the judgment was *reversed* and the *description held sufficient* (Rec., pp. 13-15); and then to the Supreme Court of Ohio, where the judgment of the Circuit Court was *affirmed* on September 23, 1913, (See *Northern Realty Co.* v. *Cuyahoga River Power Co.*, 88 Ohio St., 616, affirming a judgment of the Circuit Court of Summit County reported in).

In accordance with the Ohio practice the case was thereupon remanded, not to the Probate Court, but to the Court of Common Pleas of Summit County (Rec., p. 15); and pursuant to

the mandate of the Supreme Court the case came on for hearing in that court upon the four preliminary questions mentioned above, on *March 20, 1914* (Rec., p. 20). The defendant had succeeded, by the interposition of a technical point, in delaying for over three years the hearing which the statute contemplates shall be had almost summarily. *The significance of this delay is manifest when it is remembered that it was during this very period that there took place the so-called devotion of the land to a public use upon which the defendants rely to defeat this case.*

Upon the hearing in the Court of Common Pleas, the plaintiff introduced its evidence upon the preliminary questions mentioned in the statute. It showed by record evidence that it had been duly incorporated and organized under the statute quoted above for the purpose therein expressed, and that its corporate existence still continued (Rec., pp. 20-38). It further showed that it had negotiated with Mr. Currie, Vice-President and General Manager of the Traction Co. (Rec., p. 75), and with Mr. Christy, President of the Realty Company (Rec., p. 46) and Vice-President of the Traction Co. (Rec., p. 283), and had made definite offers to purchase the land, and that the proceeding had been instituted only after these officers had said that *the property was not for sale* and that they *would not part with it at any price* (Rec., pp. 46, 54). It further showed, by the introduction in evidence of its duly adopted plans and by the testimony of engineers, that the land in question was not only reasonably necessary, but *absolutely indispensable* for the carrying out of its corporate purpose (Rec., pp. 52, 38-40, 245, 246).

THIS EVIDENCE ON THE PART OF THE PLAINTIFF WAS UNDISPUTED AND WHOLLY UNCONTRADICTED.

The evidence on the part of the defendants showed that the Realty Company had been (or attempted to be) organized, in November, 1909, for the sole purpose of buying and selling real estate and "maintaining a general real estate agency, and doing all things incident to a general real estate business" (Rec., pp. 210, 211); that another corporation, The Northern Ohio Power Company, had been (or attempted to be) organized on a date not disclosed; and that on January 31, 1911, ELEVEN DAYS AFTER THE COMMENCEMENT OF THIS PROCEEDING, the parcel of land here involved (along with other lands) had been conveyed by said Realty Company to said Northern Ohio Power Company. This deed, also, conveys an absolute fee simple title (Rec., pp. 147-151; particularly p. 150).

The defendants also introduced evidence tending to show that the consideration for the conveyance from Milbank's Executors to Everett had been paid by the Akron, Bedford, and Cleveland Railroad, the alleged predecessor of the Traction Company (Rec., p. 57); that Everett had executed some writing, not produced but claimed to have been lost, by which he agreed (so one witness testified) to hold the land in trust for the use and benefit of the Akron, Bedford and Cleveland Railroad so long as it may desire and upon its request convey the same to it "or to any person, firm, or corporation whom it may name" (Rec., pp. 58, 66, 69, 70, 115, 116); that the Traction Company had caused the Realty Company to be organized and owned or controlled all its capital stock (Rec., p. 114); and that the taxes and other carrying charges upon the land had been paid by the Traction Company (Rec., p. 66, 83, 100).

It was shown, too, and earnestly insisted by the defendants that The Northern Ohio Power Company was but another creature of the Traction Company.

The evidence further showed that up to the time of the commencement of this proceeding in January, 1911, the only use made of the land was an occasional use as an amusement resort—for "a little dancing and roller skating"; that *subsequent* to the institution of the proceeding there had been erected upon a portion of the land in controversy and upon other lands adjacent thereto a steam power house and also an auxiliary hydro-electric power plant which, at the time of the trial, were being used for the generation of power for use in the Traction Company's business; that the work of constructing these power plants had been done in the name of The Northern Ohio Power Company and while the title to the land stood in its name and that the cost of the structures had been advanced and paid by the Traction Company, which charged the same upon its books as an open account against The Northern Ohio Power Company (Rec., pp. 71, 76-79, 83, 86, 87, 90-95, 99, 151, 230, 231).

The defendants further offered to prove that on February 24, 1914, (about one month prior to the trial of this case) The Northern Ohio Power Company conveyed the land in question, along with *all* its property, rights, and franchises, to the Traction Company. The deed itself was excluded from evidence (Rec., p. 151); but the court allowed testimony that the only consideration for the conveyance from The Northern Ohio Power Company to the Northern Company was the charging off of this book account (Rec., p. 231), and that the product of the plants was

then being used by the Traction Company (Rec., pp. 77, 78).

There was no proof, nor any offer of any proof, of any corporate resolution of either defendant or of The Northern Ohio Power Company devoting or declaring any intent to devote the land in question to power house uses or to any other use which upon any theory could be claimed to be a public use at any time prior to the commencement of this proceeding. On the contrary, the corporate records of the Traction Company introduced in evidence clearly showed that as late as February 25, 1910, "the *advisability of employing an expert for the purpose of* SECURING A SUITABLE LOCATION, devising plans, specifications, etc., for a new power house *was discussed*" and "the power committee was authorized and given *full power to employ experts* for the above mentioned purpose" (Rec., p. 68). And on December 30, 1910, a resolution was adopted authorizing the officers of the Traction Company "to *purchase* approximately 57 acres of additional property (in the vicinity of the land here involved) for the purpose of improving and developing water power." (Rec., p. 69.) It was one month later, January 31, 1911, that the 40 acres here in controversy were conveyed by the Realty Company to The Northern Ohio Power Company; and it was subsequent to that date that the power houses now being used by the Traction Company were constructed.

Despite the uncontradicted proof of the plaintiff mentioned above, *and despite this clear showing by the defendants' own evidence that the alleged devotion of the land to power house uses was accomplished by means of a "dummy" and did not occur until long after the plaintiff had acquired its grant from the State,* the Court of Common Pleas, on May 1, 1914, rendered a

judgment dismissing the plaintiff's petition *without opinion* (Rec., p. 307).

The plaintiff thereupon filed its petition in error to review said judgment, and therein claimed its constitutional rights (Rec., pp. 308-310). Upon that petition the judgment was reviewed in the Court of Appeals, Eighth District, of the State of Ohio. That court affirmed the judgment *without opinion* (Rec., p. 311).

The plaintiff thereupon sought a further review in the Supreme Court of Ohio, again setting up its claims under the Federal Constitution (Rec., p. 312), but that court declined to take jurisdiction, *delivering no opinion* (Rec., p. 319).

The present writ of error was then sued out, the writ being directed to the Court of Appeals as the highest court of the State in which a decision could be had.*

Specification of Errors. Questions Presented.

Briefly summarized, the plaintiff's claims are:

(1) that, by its incorporation for the purpose of constructing and maintaining a hydro-electric

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* By an amendment to the Ohio Constitution adopted in 1912 the Circuit Courts were abolished and a Court of Appeals was established in each of the eight appellate districts into which the state was divided. The judgments of the Court of Appeals were made final except that the Supreme Court might review its judgments in certain cases.

The procedure adopted by the plaintiff-in-error of applying to the Supreme Court for a review of the judgment of the Court of Appeals in this case and then obtaining a writ of error to the Court of Appeals after the State Supreme Court had declined to take jurisdiction of the case, has been approved by this court in *Cleveland &c. Ry. Co.* v. *Dettlebach*, 239 U. S., 588, where a judgment of the Court of Appeals was reviewed and reversed by this court after the Supreme Court of Ohio had declined to review the judgment. See, also, *Stratton* v. *Stratton*, 239 U. S., 55, where a writ of error to the Court of Appeals was dismissed because the power of the Supreme Court of Ohio to review the judgment had not been first invoked; and *Second Nat. Bank of Cincinnati* v. *First Nat. Bank of Okeana*, decided Feb. 5, 1917, where a writ of error to the trial court was dismissed because the writ should have been directed to the Court of Appeals.

plant upon the Cuyahoga River, under a statute that expressly confers the right of eminent domain for the acquisition of the lands necessary to carry out that purpose, it accepted the State's grant and thereby obtained a contract and vested property right or franchise to acquire *in invitum* the lands necessary for that purpose and then construct and maintain the plant, of which right it cannot be deprived consistently with the contract and due process clauses of the Federal Constitution;

(2) that the defendants' asserted devotion of the land to a public use, being legislative in character and having been given effect by the State court, constitutes a subsequent exertion of the legislative power of the State and hence has, by virtue of State authority, the force of a State law that impairs the obligation of the plaintiff's contract;

(3) that in accomplishing the impairment of the plaintiff's contract the State court also gave effect to the Ohio Public Service Commission Act of June 30, 1911;

(4) that the defendants' acts constitute, also, a taking of the plaintiff's property without compensation, notice or legal proceedings, and for a private use, which taking has been sanctioned and sustained by the State court, and the plaintiff has been thus deprived of its property without due process of law;

(5) that under its charter, as properly construed, the plaintiff has the right to acquire the land even though it were lawfully devoted to a real public use.

The errors relied upon are that the State court has denied each and all these various claims.

The absence of any findings or opinion makes it impossible to know the precise ground upon which the State courts proceeded. But construing the judgment in the light of the questions the court was called upon to determine and of the evidence adduced upon them, it is apparent that the State court necessarily has denied the Federal rights so asserted by the plaintiff.

The only question before the court was *whether or not the plaintiff had a right to acquire the land that constituted a contract and property right;* for slight reflection will suffice to show that the questions of corporate existence, right to appropriate, inability to agree, and necessity for the appropriation, as well as the question as to the effect of the defendants' asserted devotion of the land to a public use, are but *separate elements of that single ultimate question, i. e., mere premises from which the existence of the asserted Federal right is to be deduced;* and the Supreme Court of Ohio itself, in speaking of the four preliminary questions mentioned in the statute, has said that "whether denied or not they do not present issues of fact, but are *conditions precedent, prescribed by the legislature, to the right of eminent domain,* or to the exercise of such right, and the determination of them by the probate judge is not a trial within the meaning of the statute relating to motions for new trial" (*P. C. & T. R. R. Co.* v. *Tod,* 72 Ohio St., 156, 166). It has also referred to the question of the right to appropriate as "a mixed question of law and fact" (*State* v. *Judges,* 69 Ohio St., 372, 381).

Thus, the hearing in the State court was but *an inquest or inquisition as to the existence of the plaintiff's asserted Federal right, i. e.* its charter right to acquire the land, and the judgment of dismissal, either actually or by necessary effect,

denies the existence of that right. In other words, the Federal question was presented and must have been decided adversely to the plaintiff; and the precise ground upon which the State court based its denial is, therefore, immaterial; for under the circumstances here disclosed this court is not bound by any finding of the State court and must examine the entire record for itself, not only in order to determine whether there is evidence to support any adverse finding of the State court, but, also, in order to determine WHAT FACTS MIGHT REASONABLY BE FOUND THEREFROM WHICH WOULD FURNISH A BASIS FOR THE ASSERTED FEDERAL RIGHT (*Carlson* v. *Curtiss,* 234 U. S., 103, 106; *Southern Pacific Co.* v. *Schuyler,* 227 U. S., 601, 611; *Cedar Rapids Gas Co.* v. *Cedar Rapids,* 223 U. S., 655, 668; *Kansas City Southern Ry.* v. *Albers Com. Co.,* 223 U. S., 573, 591; *Norfolk & Western Ry. Co.* v. *West Virginia,* 236 U. S., 605, 609; *Northern Pac. Ry. Co.* v. *North Dakota,* 236 U. S., 585, 593; *Cresswill* v. *Knights of Pythias,* 225 U. S., 246, 261).

Indeed, a decision upon the Federal question so necessarily controls the determination of the case that the jurisdiction of this court would not be defeated even if the State court had actually placed its decision upon some matter of local or general law (*Gaar, Scott & Co.* v. *Shannon,* 223 U. S., 468, 471; *West Chicago Railroad* v. *Chicago,* 201 U. S., 506, 519, 520). But there is, in truth, no State question upon which the State court could have rested its judgment without denying the Federal rights, for even though some of the underlying questions presented to the State court, such as corporate existence and inability to agree, might be State questions when considered abstractly and in and of themselves, yet inasmuch as they involve and concern a subject of Federal

jurisdiction, viz., an asserted contract and property right which is alleged to have been impaired and taken, they must be considered and reviewed here independently of the assumed action of the State court with reference to them (*Cornell Steamboat Co.* v. *Phenix Construction Co.*, 233 U. S., 593, 599).

Aside from this, even if it be assumed that the State court *may* have decided the case upon a State ground (and, for example, dismissed the petition upon the sole ground that the plaintiff had not shown inability to agree), this fact "affords no basis for saying that the case *was* decided on such ground," and "mere conjecture may not be indulged in for the purpose of concluding that because there was a potentiality of considering the case from a non-Federal point of view therefore it was considered and decided in that aspect" (*St. Louis & Iron Mountain R.* v. *McWhirter*, 229 U. S., 265, 276).

The record, however, does not even disclose the potentiality of the case having been decided upon a non-Federal ground, for the defendants' asserted devotion of the land to a public use was prominently put forward as a complete and final bar to the plaintiff's right to acquire the land (Rec., p. 20). That issue was clearly made upon the record, the judgment as actually entered is a final adjudication against the plaintiff upon *all* the issues, and, upon familiar principles, such judgment (aside from its reviewability here on writ of error) makes that issue, as well as all others, *res adjudicata* against the plaintiff.*

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* The principle of *res adjudicata* appears to be fully recognized by the Ohio courts.

In *Petersine* v. *Thomas*, 28 Ohio St., 596, 600, 601, the court quoted from *Fischli* v. *Fischli*, 1 Black, 360, as follows:

"Whenever a matter is finally determined by a competent tribunal, it is considered at rest forever. And this principle

The denial of the plaintiff's asserted Federal right is, therefore, complete and permanent unless the judgment under review be reversed by this court.

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embraces not only what was actually determined, but every other matter which the parties might have litigated in the case."

and then added:

"This principle is of general application. The repose of society, in some degree, depends upon its proper application and enforcement.

"This rule will not affect any right secured to a party by law in matters of set-off, counterclaim, or cross-action. All matters of action and defense coming properly within the scope of the suit or action will be put at rest by the final determination of the action or suit, unless excepted by some provisions of law. 27 Ohio St., 233."

In *Avery* v. *Vansickle*, 35 Ohio St., 270, 274, it was said:

"There is no doubt that a former judgment upon the merits of the case is a bar to any subsequent action between the same parties or their privies upon the same cause of action, and conclusive *not only as respects questions actually decided, but as to all others involved in the issue as made.*"

In *Shoemaker* v. *Cincinnati*, 68 Ohio St., 603, 612, the principle was said to be "of universal application."

In *Railroad Co.* v. *Smith*, 54 Ohio St., 562, it was said (syllabus):

"A judgment rendered upon a finding of the issues in an action is conclusive, as between the parties, upon *all the material facts involved*, and they cannot be contested in any subsequent proceeding in the same action, so long as the judgment remains in force."

In *City of Toledo* v. *Preston*, 50 Ohio St., 361, a proceeding in a probate court for the assessment of damages sustained by abutting property owners on account of the change of grade of a street in which the jury returned a verdict of "no damages" was held to be a bar to a subsequent action by the property owner to recover such damages, despite the claim (substantiated by an order made by the probate court after the termination of the proceeding) that the jury had returned this verdict *solely in consequence of the court's instruction that the property owner had not filed his claim for damages within the time prescribed by statute.* The court stated that even though the verdict of the jury may have been in obedience to an erroneous charge of the court, "it is nevertheless their verdict and binding on the parties until set aside, either by the probate court or some one of the superior courts vested with power to review its proceedings; and this would be so even if the claim of the defendant in error for damages caused by the improvement should be regarded as in the nature of a claim for property taken and appropriated for a public use."

It is obvious, therefore, that the plaintiff could not commence a new proceeding to acquire the land in question without the well-grounded fear of being met by a plea of *res adjudicata;* and in view of this fact the effect of the judgment under review as a denial of the plaintiff's asserted Federal rights is apparent.

The errors relied upon to obtain this reversal have been summarized above and are more completely developed in the points of the argument which follow. The detailed assignments will be found at pages 327 to 331 of the record.

POINT I.

By virtue of a grant from the State, the plaintiff obtained, at the time of its organization, a vested right or franchise to acquire the land in controversy by an exercise of the power of eminent domain.

As already pointed out, the uncontradicted evidence shows that the plaintiff is a corporation specifically located by its charter and the statute (General Code, Sec. 8625) upon the Cuyahoga River and duly organized for the purpose specified in Section 10128 of the Ohio Code. That section (quoted on pp. 6, 7, *ante*) expressly grants to such corporations the right to

> "enter upon any private land • • • and • • • appropriate so much thereof as is deemed necessary"

for their corporate purposes. And the right of such corporations to make such appropriations has been sustained by the highest court of the State.

> *White* v. *Little Miami L. H. & P. Co.*, 77 Ohio St., 633, *ante*, p. 8.

The plaintiff "deems" the land in controversy to be necessary for its purpose and has expressly determined and declared that necessity (Resolu-

tion of June 4, 1908, Record, p. 36). The necessity is further shown by the uncontradicted testimony of engineers that the land is *indispensable.* (Rec., pp. 52, 38-40, 245, 246.) In fact, the land constitutes the bed and banks of the Cuyahoga river for a distance of about a mile and three-quarters within the limits of the plaintiff's right of way as expressly determined by its articles of incorporation (Rec., pp. 50, 51, 57, 80, and Deft's Ex. J. opposite p. 305). It is within "the express terms of the grant" and the grant cannot be fulfilled unless the plaintiff may acquire it.

So far as "inability to agree" as to the compensation to be paid is concerned, it is sufficient to say that long and repeated negotiations for the purchase of the land were carried on by the plaintiff's agents with certain individuals who were officers of both the Realty Company and the Traction Company and these individuals emphatically announced that there was "nothing doing" (Rec., p. 46) and that "they would not part with the property at any price" (Rec., p. 46).

There can be no doubt, therefore, of the plaintiff's plain right, secured by express grant from the State, to acquire the land by an exercise of the power of eminent domain, which right was complete and perfect the moment the plaintiff accepted the State's offer by organizing under the statute.

The defendants' arguments in the courts below rested very largely upon the assumption that the plaintiff's incorporation and its adoption of its plan of development vested it with no rights in, to, or against the land in controversy—that no rights whatever are acquired prior to the time a judgment of condemnation is entered and the assessed compensation is paid. This assumption, it may be noted in passing, is one which has been

elsewhere indulged concerning this very plaintiff (See *Cuyahoga River Power Co.* v. *Akron*, 210 *Fed.*, 524, which was reversed by this court, on March 20, 1916, in 240 U. S., 462).

We freely concede that under the Constitution and statutes of Ohio the title of the private owner to land appropriated under the power of eminent domain does not pass to the condemning corporation until the compensation of the private owner has been assessed and paid pursuant to the verdict of a jury and the judgment of a court.

> *State ex rel.* v. *Cincinnati*, 17 Ohio St., 103;
> *Wagner* v. *Railway Co.*, 38 Ohio St., 32, 36.

But it is not the private owner's title to the land that we here assert and seek to protect. The right we here assert, the "title, right, privilege or immunity" which we here set up, is the *right to acquire the title of the private owner*, or, in other words, *our franchise of eminent domain;* and we obtain this right or franchise, not from any private owner by virtue of an assessment and payment of compensation, but directly from the State itself by virtue of its grant.

The power of eminent domain is an inseparable incident of sovereignty which may be exercised at any time either directly by the State or indirectly by such agency as it may select, including "the instrumentality of private individuals incorporated for the purpose."

> *Giesy* v. *Cincinnati, W. & Z. R. R. Co.*, 4 Ohio St., 308, reaffirmed in
> *White* v. *Little Miami L. H. & P. Co.*, 77 Ohio St., 633, construing the identical statute under which the plaintiff here was organized.

It is *vested in the legislature* by virtue of the general grant of legislative power contained in Section 1 of Article II of the Ohio Constitution; and the legislature may delegate the power to private corporations organized for a public purpose.

Giesy v. *Cincinnati &c. Co., supra.*

The power "constitutes a condition upon which all property is holden."

Kramer v. *Cleveland & Pittsburg R. R.*, 5 Ohio St., 140, 146.

All land is always subject to an exercise of the power.

Cincinnati v. *Louisville & N. R. R. Co.*, 223 U. S., 390, 400;
Long Island Water Supply Co. v. *Brooklyn*, 166 U. S., 685.

Or, as stated in the Ohio Constitution, all property is always "subservient to the public welfare."

Ohio Const., Art. I, Sec. 19.

In view of this provision of the Ohio Constitution and the holdings in the *Giesy* and *Kramer* cases, *supra*, it seems very clear that in Ohio, at least, the State has *a dominant or paramount title to all lands in the State*, that the private owner's title is always subservient or subject to this ever-existing dominant title of the State, and that by its grant from the State the plaintiff acquired, *ipso facto*, a real *title* to the land in question which was paramount to the title of the private owner despite the fact that compensation to the private owner must be assessed and paid before the right of possession attached. But whether the plaintiff's right be regarded as a title to the land itself or merely as a right to acquire a title

to it, is really immaterial. It is at least certain that the delegation of the power of eminent domain to a corporation is the conferring of a *prerogative of sovereignty.*

It is thus in its very essence *the grant of a franchise;* for a franchise is defined to be

> "A royal privilege in the hands of a subject."
>
> "Certain privileges conferred by a grant from government and vested in individuals."
>
> "Special privileges conferred by the government on individuals, and which do not belong to the citizens of the country generally of common right."
>
> "A particular privilege conferred by the grant of the government and vested in individuals."
>
> See *Joyce on Franchises,* §§ 1 and 2, where the definitions are collected and the authorities cited, and *State* v. *Railway Co.,* 50 Ohio St., 239, 251.

Indeed, the right to exercise the power of eminent domain frequently has been specifically designated as a franchise.

> *California* v. *Central Pac. R. Co.,* 127 U. S., 1, 40;
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> *Parkside Cemetery Ass'n* v. *Cleveland, Buffalo & Geauga Lake Traction Co.,* 93 Ohio St., 161; 112 N. E., 596, 602, per JONES, *J.,* in dissenting opinion but not differing from the court on this point;
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> *Brinckerhoff* v. *Newark & Hackensack Traction Co.,* 66 N. J. L., 478;
>
> *Chicago &c. R. R. Co.* v. *Dunbar,* 95 Ill., 571, 579;
>
> *Shamokin Valley R. R. Co.* v. *Livermore,* 47 Pa., 465, 468.

In *Brinckerhoff* v. *Newark & Hackensack Traction Co., supra,* it was held that the right to exercise the power of eminent domain passed under a sale of the "property and franchises" of a corporation pursuant to a statute. The Supreme Court of New Jersey said (p. 481):

> "While the act does not expressly declare that the new corporation shall have *the right to take lands by eminent domain,* it provides that the corporation organized under it 'shall be entitled to all the rights, liberties, privileges and franchises of the corporation whose property and franchises have been so sold and conveyed.'
>
> "The Union Traction Company, to whose title the defendant company has succeeded, was incorporated under the Traction Act of 1893, which gives to corporations organized under it the right to take lands necessary for the construction of their lines by condemnation. It likewise gives such companies the right and power to extend from time to time existing lines.
>
> *"This was a valuable right and franchise vested in the Union Traction Company at the time of the sale, and was as much a part of its property and franchises as the right to operate its then completed road."*

It is thus plain that from the time of its organization the plaintiff was vested with the right or franchise to acquire the land *in invitum;* from that time the land was subject or "subservient" to that right as vested in the plaintiff and was held upon the condition that the plaintiff might acquire it—might take it from the owner upon paying just compensation therefor. And from that time to this the plaintiff has been diligently and in good faith engaged in attempting to make its right and franchise effective.

POINT II.

The plaintiff's right to acquire the land in controversy is a contract right and a right to property within the meaning and protection of the Federal Constitution. It is a "title, right, privilege or immunity claimed under the Constitution."

It is of course unnecessary in this court to cite authorities for the proposition that a corporate charter, whether obtained by special act of the legislature or by incorporation under general laws, is a *contract* protected by the Federal Constitution.

What, then, is the *scope* of the plaintiff's contract? Does it include the *right to acquire* the lands necessary for the construction and maintenance of the improvement the plaintiff was formed to develop? Is that right one which is protected from impairment or deprivation by the contract and due process clauses of the Constitution?

In *Piqua Branch State Bank* v. *Knoop*, 16 How., 369, which arose in Ohio and is peculiarly appropriate here,* this Court used language that is apt and controlling. Referring to the statute under which the bank had been organized, the pro-

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*This is one of the so-called "Ohio Bank Cases" in which this Court reversed a holding by the Supreme Court of Ohio that a charter is not a contract. Five of these cases were successively taken to this Court upon writ of error to the Supreme Court of Ohio, and in each of them the judgment of the State Court was *reversed* (*Piqua Branch State Bank* v. *Knoop*, 16 How., 369; *Mechanics & Traders Bank* v. *Debolt*, 18 How., 380; *Mechanics & Traders Bank* v. *Thomas*, 18 How., 384; *Jefferson Branch Bank* v. *Skelly*, 2 Black., 436; *Franklin Branch Bank* v. *State of Ohio*, 2 Black., 474). A note discussing these cases will be found in 60 L. R. A., 60. We would have supposed that the long controversy between this Court and the Supreme Court of Ohio with respect to the inviolability of corporate charters was now of merely historical interest.

visions of which were claimed to constitute a contract, it was said (p. 380):

> "The 60th section is not found in a general law, as is intimated by the Supreme Court of the State. The Act of 1845 is *general only in the sense that all banking associations were permitted to organize under it; but the act is as special to each bank as if no other institution were incorporated by it.* We suppose this cannot be controverted by any one. This view is so clear in itself that no illustration can make it clearer.
>
> "*Every valuable privilege given by the charter, and which conduced to an acceptance of it and an organization under it, is a contract* which cannot be changed by the Legislature, where the power to do so is not reserved in the charter. The rate of discount, the duration of the charter, the specific tax agreed to be paid, *and other provisions essentially connected with the franchise, and necessary to the business of the bank,* cannot, without its consent, become a subject for legislative action."

It is, of course, of no moment here that the Ohio Constitution now contains a reserved power to alter, amend or repeal; for in this case there has been no attempt to exercise that power.

Now what are the "valuable privileges" given by the plaintiff's charter "which conduced to an acceptance of it and an organization under it?" What are the charter provisions "essentially connected with the franchise and necessary to the business" of the plaintiff?

The purpose of the plaintiff's organization, as already pointed out, conforms exactly to Section 10,128 of the Ohio Code. Its articles of incorporation, moreover, specifically name the Cuya-

hoga River as the stream upon which its plant should be erected; and this designation of the *place* of its improvement was made in accordance with the express requirement of the statute (Code, Sec. 8625).

A mere reading of the statutes and articles of incorporation thus makes it plain to a demonstration that the State has granted, not a mere capacity to exist as a corporation nor yet a mere authority to build a plant somewhere upon some river, but *a specific right or franchise to construct a plant upon the Cuyahoga River between specified termini and to appropriate and use the lands necessary for the maintenance and operation of the plant;* or, in other words, a *right of way* over and along the river for the construction and operation of the plant.

The plain language of the charter, the whole intent and meaning of the grant, is that the plaintiff should have the right to erect dams, locks, raceways, &c., in and upon the Cuyahoga River and *the right to* ENTER UPON AND APPROPRIATE *the land necessary for the purpose* of constructing and maintaining these contrivances in order to develop and sell hydro-electric power. *These* are the "valuable privileges" given by the charter "which conduced to its acceptance and an organization under it." *These* are the rights and powers which are "essentially connected with the franchise and necessary to the business of the" corporation. *These* are the things which, in the language of this Court in *Pearsall* v. *Great Northern Railway,* 161 U. S., 646, 664, are "so far necessary to the full enjoyment of the main object of the charter that persons subscribing to the stock might be presumed to take into consideration, and be influenced in their subscriptions, by the fact that the corporation was endowed with

those privileges during the continuance of the charter."

The charter itself, therefore, is thus so explicit in locating the company's improvement in a specified place and in conferring the right to enter upon and appropriate that place for the construction of the plant, as to make it A SPECIFIC GRANT OF A RIGHT OF WAY *over the river between the named termini;* and if the plaintiff did not obtain by that grant a vested right to acquire the lands necessary to carry on its corporate purpose its charter really amounted to nothing.

In the well known and oft-approved case of *Chesapeake & Ohio Canal Co.* v. *Baltimore & Ohio R. R. Co.*, 4 Gill & Johns., 1, it was held that by the charter of the Canal Company the valley of the Potomac River, from tidewater to the highest practicable point of navigation on the north branch, was *specifically appropriated* to the building of a canal, and at the time of its incorporation the company acquired, not the actual legal title to the land, but a *vested right or franchise to acquire the land by purchase or condemnation*, which could not be defeated without an impairment of the contract. The Court said (p. 144):

> "This franchise, this corporate right, to select and acquire land for the authorized purposes of a corporation, is property; it is an incorporeal hereditament, not a legal title to the land itself, not a mere capacity or faculty to acquire and hold land, such as every individual possesses; but in addition to such capacity, it is a right or privilege, *a portion of the eminent domain vested in the corporation, to acquire the legal title to land subjected by the grant to its will*, and thus to convert the incorporeal into a corporeal hereditament, and after the franchise to choose and condemn land for any particu-

> lar public purpose, that portion of the eminent domain granted and subsisting in one corporation, cannot be bestowed upon another, to the prejudice of the former grant; *nor can any other legally acquire any such right of way or title to the land over which the franchise extends, as will hinder the former corporation in the exercise and enjoyment of its franchise.*"

In *Morris & Essex R. R. Co.* v. *Blair*, 9 N. J. Eq., 635, which involved a controversy between two railroads whose charters fixed merely the terminal point and prescribed no specific route, the Court referred to this absence of a specific location in the charter itself, and said (p. 644):

> "It is not a case, therefore, of a prior grant of a *specific route* for a railroad by the legislature to one company, and a subsequent grant of the same route to another company, without repealing the former grant, or providing for compensation. *If it were, upon principle and authority, the first company would take a vested right in the route, to the exclusion of the second. Chesapeake & Ohio Canal Co.* v. *Baltimore & Ohio R. R. Co.*, 4 Gill & Johns., 1."

It was held that when the grant had been made specific *by the corporation's adoption of a definite route* that corporation had a vested right to the route, of which it could not be deprived by a subsequent purchase of the land by another company for railroad purposes.

The decisions which follow and apply the doctrine of the cases just mentioned are too numerous to cite. Many of the more recent cases in this Court relate to grants contained in city ordinances; but there is, of course, no difference in

principle. It is the sanction and authority of the sovereign which gives the grant its vitality and effect, and it is immaterial whether the grant be contained in the Constitution* or in a statute† or in a city ordinance.‡ In each case the grant is a complete and binding contract *from the moment the State's offer is accepted* and "the grantee is thus protected in starting the enterprise" and during "the initial stages" and while "the necessary proceedings preliminary to the execution of the proposed work are being taken with due promptness."

> *New York Elec. Lines Co.* v. *Empire City Subway Co.*, 235 U. S., 179, 193, 194.

It is settled, too, that acceptance lies in an investment of money and a change of position upon the faith of the offer.

> *Russell* v. *Sebastian*, 233 U. S., 195, 208, 210.

And that, when accepted and acted upon, the grant becomes binding, not step by step as the work proceeds, but "as an entirety, in accordance with its purpose and express language."

> *Russell* v. *Sebastian, supra*, at page 207.
> *Grand Trunk W. Ry. Co.* v. *South Bend*, 227 U. S., 544, 555, 556.

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* As in *Russell* v. *Sebastian*, 233 U. S., 195.

† As in the case at bar, *Monongahela Navigation Co.* v. *United States*, 148 U. S., 312; *Willcox* v. *Consolidated Gas Co.*, 212 U. S., 19; *Piqua Branch State Bank* v. *Knoop, supra; Reagan* v. *Farmers L. & T. Co., infra; New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S., 650; *New Orleans Water Works Co.* v. *Rivers*, 115 U. S., 674; *St. Tammany Water Works* v. *New Orleans Water Works*, 120 U. S., 64.

‡ As in *Louisville* v. *Cumberland Tel Co.*, 224 U. S., 649; *Grand Trunk Western Ry. Co.* v. *South Bend*, 227 U. S., 544; *Boise Water Co.* v. *Boise City*, 230 U. S., 85; *Owensboro* v. *Cumberland Tel. Co.*, 230 U. S., 58; *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S., 517; *N. Y. Elec. Lines Co.* v. *Empire City Subway Co.*, 235 U. S., 179.

In *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S., 362, 393, the court, after stating that a corporate charter is a contract within the meaning of the Constitution, said:

> "All that is within the scope of this contract need not be determined. Obviously, one obligation assumed by the corporation was to construct and operate a railroad between the termini named; and on the other hand, *one obligation assumed by the State was that it would not prevent the company from so constructing and operating the road.*"

In *Pearsall* v. *Great Northern Railway*, 161 U. S., 646, 673, the court in speaking of the term "vested rights" said (p. 673):

> "As applied to railroad corporations, it may reasonably be contended that the term extends to all rights of property acquired by executed contracts, *as well as to all such rights as are necessary to the full and complete enjoyment of the original grant*, or of property legally acquired subsequent to such grant. If, for example, the legislature should authorize the construction of a certain railroad, and by a subsequent act should take away the power to raise funds for the construction of the road in the usual manner by a mortgage, or the power to purchase rolling stock or equipment, such acts might perhaps be treated as so far destructive of the original grant as to render it valueless, although there might in neither case be an express repeal of any of its provisions. *Sala* v. *New Orleans*, 2 Woods, 188."

And in the recent case of *Long Sault Development Co.* v. *Call*, 242 U. S., 272, 276, Mr. Justice CLARKE, used language exactly applicable here:

Speaking of an act that, like the statute here, authorized the company "to construct, maintain and operate dams, canals, reservoirs and the appurtenances necessary or useful for the purpose of developing water power and electrical energy" at such point or points on a specified portion of a named river as may be selected by the company, he said:

> "THE GRANTS OF THE ACT OF 1907 ARE SUCH THAT, IF IT WAS A VALID LAW, UPON THEIR BEING ACCEPTED, THEY CONSTITUTED PROPERTY OR CONTRACT RIGHTS, OF WHICH THE PLAINTIFF COULD NOT BE DEPRIVED AND WHICH COULD NOT BE IMPAIRED, BY SUBSEQUENT LEGISLATION."

The State Court, too, has long since receded from the position it took in the "Bank Cases," *supra,* and has for many years recognized that the acceptance of a State grant creates a binding contract.

> *Hamilton G. & C. Traction Co.* v. *Hamilton & L. Elec. Transit Co.,* 69 Ohio St., 402.
>
> *Railway Co.* v. *Village of Carthage,* 36 Ohio St., 631.
>
> *City of Columbus* v. *Street Railroad Co.,* 45 Ohio St., 98.

The two cases last cited were referred to by this Court in *Cleveland* v. *Cleveland City Ry. Co.,* 194 U. S., 517, as follows (p. 534):

> "That in the courts of Ohio the acceptance of an ordinance of the character of those just referred to is deemed to create a binding contract is settled. *Railway Co.* v. *Village of Carthage,* 36 Ohio St., 631, 634; *City of Columbus* v. *Street Railroad Co.,* 45 Ohio St., 98."

In the *Hamilton case, supra,* the Supreme Court of Ohio, upon full consideration squarely held that a grant of the right to occupy and use certain streets for the purpose of constructing, operating and maintaining a street railway, was a *contract* and a *vested property right* which could not be taken or impaired except upon payment of just compensation, even though the grantee acquired no fee in the soil upon which its railroad was to be constructed. In the course of the opinion it was said (p. 409):

> "But it is, we think, equally well settled that where the right is given by ordinance to a street railway company to occupy and use particular parts of certain streets, and the grant so made is accepted and acted upon by the grantee, the City authorities are thereafter, so long as said grant remains in full force, unforfeited and unrevoked, without right or authority to grant to another street railway company for like use the right to have and occupy without appropriation or the making of compensation therefor to the first grantee, *precisely the same ground or right of way first granted.* TO PERMIT THIS WOULD BE TO SANCTION AND ALLOW THE IMPAIRMENT OF THE OBLIGATION OF AN EXISTING CONTRACT BY SUBSEQUENT MUNICIPAL LEGISLATION OR GRANT. This may not rightfully be done.
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> • • • • • • •
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> "While it is undoubtedly true that a street railway company, under a grant authorizing it to occupy and use certain streets for the purpose of constructing, operating, and maintaining thereon its street railway, *acquires no fee in the soil upon which its roadbed is constructed* and its ties and tracks are laid, *it nevertheless does acquire therein a franchise and easement, which becomes and is its private property;* and it has the right, dur-

ing the life of the grant, to the possession and enjoyment of that franchise and easement without interruption or obstruction from any other company, until such time, at least, as it may voluntarily surrender the same or be legally divested thereof by an authorized appropriation and the payment of full compensation therefor, as required by the Constitution and Laws of the State of Ohio. The right which the grantee acquires by such grant *is more than a mere license. It is a vested property right,* in the nature of a franchise or easement in and to the particular portion of the street designated in the grant itself; * * *."

In *Louisville Trust Co.* v. *Cincinnati,* 76 Fed., 296, Mr. Justice LURTON (then Circuit Judge), speaking for the Circuit Court of Appeals for the Sixth Circuit in a case involving the construction and effect of a grant under the law of Ohio, said (p. 299):

> "The grant of a right to enter upon and occupy a public street with the necessary tracks, poles, wires and equipment of an electric street railway is a grant of a typical easement in property, and as such is a contract right capable, in the absence of express restrictions, of being sold, conveyed, assigned or mortgaged, and is, therefore, a right entitled to all the protection afforded other property or contract rights."

No distinction can be drawn between a grant of the right to enter upon and occupy a public street with a street railway and a grant of the right to enter upon and appropriate land for a hydro-electric plant; and the cases cited are controlling. They are clear, explicit, and decisive, in holding that the Ohio statute here involved is

an offer by the State, which was accepted by the plaintiff's organization under it and was converted, by such acceptance, into a binding *contract* and a *vested property right.* (See, particularly, *Russell* v. *Sebastian, supra*). Indeed, the decision of the State Court in the *Hamilton case, supra,* leaves but little to be said here. The plaintiff's direct grant from the State of the right to appropriate land for a hydro-electric plant upon the Cuyahoga River is fully as binding and efficacious as the grant which the Hamilton Transit Company received from the City of Hamilton. The place where the plaintiff's plant was to be located, viz., along the Cuyahoga River between the termini mentioned, is quite as definite and precise as the grant of a right to lay tracks in a specified city street. The grant was accepted and acted upon when the plaintiff completed its organization and "by its investment, had irrevocably committed itself to the undertaking." (*Russell* v. *Sebastian, supra,* at p. 210). The grant being thus accepted and acted upon, the plaintiff had acquired "a vested property right in the nature of a franchise or easement in and to the particular" lands designated in the grant, although it had acquired no fee in the soil upon which its plant was to be constructed. The analogy between the *Hamilton case* and the case here is complete.

It is furthermore exceedingly important to note that every railroad company organized in Ohio since 1852 has been organized under a general statute the same in substance as that under which the plaintiff here was incorporated, and the entire power and franchise obtained by every such railroad company is that derived from the provision of the statute that

> "Any railroad company may maintain and operate, or construct, maintain and operate,

a railroad, with a single or double track, with such side tracks, turnouts, offices, depots, round-houses, machine shops, water tanks, telegraph lines, and other necessary appliances, as it deems necessary, between the points named in its articles of incorporation, commencing at or within, and extending to or into any city, village, or place, named as a terminus of its road" (R. S., Sec. 3270).

Ohio General Code, Section 8745.

It is this statute alone which constitutes the grant under which most of the existing railroads of Ohio were built and are being operated. The same thing is true, in a general way, of most of the railroads in other States.

Indeed, if this court should sustain the idea that the plaintiff acquired no rights as against the land in controversy, no *right to acquire* the title of the private owner, which vested in it by its acceptance of the State's offer, then the consequences are grave indeed, not only for this plaintiff, but also for every other person and corporation expending money for the erection of any public utility whatever and for the large portion of the citizens of the country who are dependent for light, heat, power, water, telephones, telegraphs and railroads upon the activities of these private companies undertaking the public service. For if the plaintiff's charter do not mean that the right to acquire the land necessary for its plant is granted to it, what does it mean? When is such a franchise acquired? Is it when the soil is actually acquired and paid for? Is it when the proposed improvement is actually constructed? Is it when the contemplated service is actually commenced? If this be so, then no right to acquire the land, no right to construct dams or string wires or lay

pipes, can ever be acquired—the State's offer of the right to acquire lands in order to build a plant in a particular river cannot be accepted at all, and the only thing which can be secured is the *right to maintain a plant already constructed.*

See

Russell v. *Sebastian,* 233 U. S., at p. 208.

There is no middle ground upon which to stand. One doctrine or the other must be applied; and if the plaintiff's claim here be not sustained, then no right to acquire the lands necessary to make the State's grant useful or effective could vest in the company during all the long years necessary for the acquisition of title and the construction of the physical works, and investors in such enterprises must take their chances as to what may happen during the interim. It is needless to say that if that be the law, it simply means that public utilities cannot be built, for it is an actual fact, repeatedly recognized by this Court, that private capital will never be invested in such undertakings if the rights of the corporation undertaking the service be subject to immediate revocation, either by legislative repeal or by the interference of other corporations seeking to utilize the same subject matter for a conflicting use, at any time before the company gets to the point of actually furnishing the service which it was formed to supply.

N. Y. Elec. Lines Co. v. *Empire City Subway Co.,* 235 U. S., 179, at p. 193;

Louisville v. *Cumberland Telephone Co.,* 224 U. S., 649, at p. 663;

Boise Water Co. v. *Boise City,* 230 U. S., 85, 90;

Owensboro v. *Cumberland Telephone Co.,* 230 U. S., 58;

Russell v. *Sebastian,* 233 U. S., 195, 208.

The case at bar is an apt illustration: The bold proposition asserted by the defendants is that they can, with impunity, destroy the plaintiff's entire enterprise simply by building power-plants *while the condemnation proceeding is pending, i. e.*, while they are holding up the plaintiff by unfounded litigation over the sufficiency of the description contained in the appropriation petition. If enterprises such as the plaintiff's can be thwarted in this way, it is plain they will never be undertaken.

Turning now to a consideration of the plaintiff's right to acquire the land in question as *property* rather than as a *contract* (a distinction which is perhaps more superficial than real), we find the authorities equally strong in support of our position.

> "This franchise, this corporate right, to select and acquire land for the authorized purposes of a corporation, is property * * *."
>
> *Chesapeake & Ohio Canal Co.* v. *Baltimore & Ohio R. R. Co.*, 4 Gill & J., 1, 144, quoted *ante*, p. 33.

> "It seems to us impossible to draw a distinction between a *right of property* and a *right of acquiring property* that will make a disturbance of the latter any less actionable than a disturbance of the former. In a civilized community which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his efforts to acquire it. The cup of Tantalus would be a fitting symbol for such a mockery. Our constitution recognizes no such notion."

Thus wrote Mr. Justice PITNEY for the New Jersey Court of Errors and Appeals in *Brennan* v. *United Hatters,* 73 N. J. Law, 729, 742.

And the principle has received the sanction of this court.

Coppage v. *Kansas,* 236 U. S. 1, 14.

"Property" does not consist of the corporeal object, but of "certain rights in things which pertain to persons and which are created and sanctioned by law," viz., the right of user, the right of exclusion, and the right of disposition.

Lewis, Eminent Domain (3 Ed)., Sec. 63; also Sections 64 and 65;

Pumpelly v. *Green Bay Co.,* 13 Wall., 166, 177;

Mansfield v. *Balliett,* 65 Ohio St., 451, 464, 470;

Callen v. *Electric Light Co.,* 66 Ohio St., 166, 175, 177, 178.

The "right to acquire" a parcel of land is not a title to the land itself; it is not corporeal but incorporeal and intangible. It is, however, a *franchise,* and

> "Corporate franchises * * * are legal estates, and not mere naked powers granted to the corporation, but powers coupled with an interest which vest in the corporation by virtue of their charter * * *."
>
> *Hamilton Co.* v. *Massachusetts,* 6 Wall. 632, 638.

A grant of a franchise is not in point of principle distinguishable from a granting of *any other property.*

Dartmouth College v. *Woodward,* 4 Wheat, 518, 699-701, per STORY, *J.*

And a power which is a franchise is property.

West River Bridge Co. v. *Dix.*, 6 How. 507, 543.

Moreover, in the present case at least the "right to acquire" the land in question is "necessary to the full enjoyment of the main object of the charter;" and certainly it is as valuable and substantial and has as many of the attributes of property as the right of a sleeping-car company to let down its upper berths even when not sold (*Chicago, Mil. & St. Paul R. R. Co.* v. *Wisconsin*, 238 U. S., 491), the right of an abutting owner to prevent the closing of an alley (*Bowe* v. *Scott*, 233 U. S., 658), the right to compensation for damages resulting from a street grading (*Ettor* v. *Tacoma*, 228 U. S., 148, 158), the right to settle on land and remain in possession so as to perform acts necessary to the acquisition of title (*Gauthier* v. *Morrison*, 232 U. S., 452, 458), the right to erect poles and string wires for a telephone system (*Owensboro* v. *Cumberland Telephone Co.*, 230 U. S., 58, 65), the right to lay pipes or railroad tracks not yet actually laid (*Russell* v. *Sebastian, supra; Grand Trunk Western Ry. Co.* v. *City of South Bend*, 227 U. S., 544; *Rochester, etc., Co.* v. *City of Rochester*, 176 N. Y., 36; *People ex rel. Woodhaven Gas Co.* v. *Deehan*, 153 N. Y., 528), the right to contract for the use of property (*Ingersoll* v. *Nassau El. R. R. Co.*, 157 N. Y., 453; *Roddy* v. *Brooklyn City, etc., R. R. Co.*, 32 N. Y. App. Div., 311), the right of a stockholder to vote (*Lord* v. *Equitable Life Assurance Society*, 194 N. Y., 212), the right to light, air, and access over a city street or a country road (*Callen* v. *Electric Light Co.*, 66 Ohio St., 166; *Schaaf* v. *Railway Co.*, 66 Ohio St., 215; *Muhlker* v. *New York & Harlem*

R. R. Co., 197 U. S., 544), the right to take tolls (*Monongahela Navigation Co.* v. *United States*, 148 U. S., 312, 344, 345; *Turnpike Co.* v. *Parks*, 50 Ohio St., 568, 575; *Detroit* v. *Detroit & H. Plank Road Co.*, 43 Mich., 140, per COOLEY, *J.*), or the rights of riparian owners (*Mansfield* v. *Balliet*, 65 Ohio St., 451).

As said in *Louisville* v. *Cumberland Telephone Co.*, 224 U. S., 649, 661, the right, however named, is property.

In this connection we call particular attention to the Ohio Supreme Court's conception of *property* as expressed in *Callen* v. *Electric Light Co.*, 66 Ohio St., 166, and *Schaaf* v. *Railway Co.*, *id.*, 215.

In *Callen* v. *Electric Light Co.*, *supra*, the owner of a lot abutting upon a city street sought to enjoin the defendant (which was acting under authority of a city ordinance) from erecting poles and wires for an electric lighting system in front of his premises. The injunction was granted enjoining the maintenance of the poles and wires and the defendant was further ordered to remove the poles and wires which had been already placed there. After referring to numerous authorities with respect to a lot owner's right in a city street, the Court said (p. 175):

> "And if, as held by these adjudications, the owner's right in the street is to be treated as property, the only remaining question is whether or not the acts of the defendant complained of constitute, in an essential degree, a taking of that property within the meaning of the constitution. *And here we inquire what is meant by the word 'property'?* If, as was once understood, and is still understood by some, it means only a corporeal thing, as a horse or a piece of land, then a

negative answer to the question would seem to follow. If, however, the true meaning is the right of property in and dominion over the specific thing, then we would seem to be led to a different answer. That the latter meaning is the true one appears now to be the settled doctrine. *Under this definition the word 'property' is held to denote certain rights in things which pertain to persons and which are created and sanctioned by law.* They are, as stated by one writer, 'the right of user, the right of exclusion and the right of disposition * * * . A person's right of property in things, therefore, consists of the right to possess, use and dispose thereof in such manner as is not inconsistent with law.' "

Upon the question whether the acts of the defendants constituted a taking, the Court said (p. 177):

"But the rule more frequently held, and, we think, the more enlightened rule, is that this limitation to the term 'taking' to the actual physical appropriation of the corpus is too narrow a construction to meet the demands of justice, and that, *from the very nature of the right of user and exclusion, it is evident that they cannot be materially abridged without necessarily taking the owner's property,* for, if the right of user is an essential element of ownership, then whatever physical interference annuls this right takes property."

And also on page 178:

"And if the owner's right in the street be property, as hereinbefore defined, and as such is protected by the constitution, it inevitably follows that the attempt by a private corpo-

> ration, in order to accomplish its own private business purposes, to invade that right by placing in the street in front of the lot permanent erections which will, in any appreciable degree, impair the owner's access to the lot, or otherwise interfere with the full enjoyment of the lot for all purposes to which it is adapted, or of the street itself, such an invasion is an attempted taking; it is a diversion of the use of the street from the purposes originally designed for it, and if it can be taken at all as against the will of the owner, it must be upon the terms prescribed by the constitution."

In *Schaaf* v. *Railway Co., supra,* the doctrine of the preceding case was applied in an action by the owner of a farm to enjoin the construction and operation of an interurban electric railway over a highway in front of the plaintiff's premises. The Court enjoined the defendant from proceeding, and also directed it to remove all material and obstructions which it had placed in the highway and restore the highway to the condition in which it was at the time it commenced work.

So, too, in *Turnpike Co.* v. *Parks,* 50 Ohio St., 568, 576, it was said that "a franchise cannot be distinguished from other property," and it was accordingly held that by making a toll road a free road the franchise to collect tolls was "virtually forfeited" and this could be accomplished only by due process of law.

Certainly the "right to acquire" a particular parcel of land, the right to appropriate the land to a particular use in order to carry out a grant from the State, comes within the definition of property as laid down in these authorities. It is a right which, originally residing in the State as an incident of its own sovereignty, has been con-

ferred upon the plaintiff by the State. It is a right essential to the accomplishment of the purpose for which the plaintiff was formed. Without it, the entire charter of the plaintiff, offered to it by the State and duly accepted in the manner prescribed by law, is meaningless and useless. If the Constitution do not extend to the protection of such rights it is indeed difficult to see to what it does extend.

POINT III.

The plaintiff has been deprived of its property without due process of law, in that its property has been taken by the State, or under color of State authority, without compensation and for a private use.

The indisputable fact that the dam and power plants have been erected, within the limits of the plaintiff's right of way as fixed by its charter, upon lands that are indispensable to the exercise of the plaintiff's grant—particularly when coupled, as it is, with the decision of the State court that by reason of that fact the plaintiff cannot acquire the land—makes it clear beyond controversy that the plaintiff's property, its right to acquire the land and construct and operate its plant in the place and in the manner provided in its charter, has been TAKEN.

In *Louisville Trust Co.* v. *Cincinnati* (*ante*, p. 39), Mr. Justice LURTON said that a grant such as the plaintiff's is "a typical easement"; and in *Reeves* v. *Treasurer of Wood County*, 8 Ohio

St., 333, the Supreme Court of Ohio said "An easement is property."

And inasmuch as the entry upon the land in question and the erection of the dam and power plants has been *construed and applied by the State court so as to defeat the plaintiff's easement or franchise,* such entry was as much a taking of the plaintiff's property as the erection of the New York elevated railroads or the construction of the Park Avenue Viaduct in such manner as to interfere with the abutting land owners' easements of light, air and access to and from streets in which they owned no soil, was a taking of the "property" of such abutting owners.

> *Muhlker* v. *N. Y. & Harlem R. R. Co.,* 197 U. S., 544.

It was as much a taking of the plaintiff's property as the erection of poles and wires for an electric lighting system in the public streets of Columbus was a taking of the same easements of an abutting lot owner in that city.

> *Callen* v. *Electric Light Co.,* 66 Ohio St., 166; *ante,* p. 46.

It was as much a taking of its property as the construction of an interurban railway along a public highway was a taking of the same easements of an abutting farm owner in the country districts of Ohio.

> *Schaaf* v. *Railway Co.,* 66 Ohio St., 215; *ante,* p. 48.

It was as much a taking of its property as a grant of the right to occupy public streets with a railway system was a taking of the property of

an existing street railway which had previously obtained a similar grant.

Hamilton G. & C. Traction Co. v. *Hamilton Elec. Transit Co.*, 69 Ohio St., 402; *ante*, pp. 37, 38, 39.

In short, the cases cited make it perfectly clear that the invasion of an intangible right or incorporeal hereditament, such as an easement or the plaintiff's franchise, is a taking of property as much as the physical seizure and occupancy of another's house or bit of soil; and the owner of such easement or franchise is protected by the Constitution against its invasion even though there be no actual entry upon any soil to which the owner of the franchise has title or of which he is entitled to actual possession.

It is clear, too, that inasmuch as the taking here is for *an alleged public use* and has been accomplished under color of authority claimed to have been conferred by the State upon a so-called public service corporation for the asserted and ostensible purpose of performing franchises claimed to have been granted to it by the State, the taking is to be regarded as *the act of the State* within the meaning of the Fourteenth Amendment.

Home Tel. & Tel. Co. v. *Los Angeles*, 227 U. S., 278;
Cuyahoga River Power Co. v. *Akron*, 240 U. S., 462.

And as no compensation has been paid it is settled by many decisions of this court that the taking is without due process of law, the payment of just compensation for property taken for

a public use being an essential element of due process of law.

Consolidated Turnpike Co. v. *Norfolk &c. Ry.*, 228 U. S., 326, 330;
Chicago, B. & Q. R. R. Co. v. *Chicago*, 166 U. S., 226;
Appelby v. *Buffalo*, 221 U. S., 524.

If there were no other question in the case this fact alone would necessitate a reversal of the judgment under review.

But aside from this—that is, even though the erection of the dam and power plants were not even claimed to be for a public use and were originally without any color or assertion of State authority, the taking of the plaintiff's property must nevertheless be now regarded as State action; for if that view be taken then the record presents the bald case of a deliberate taking of the property of one person by another without any authority of law, *which has been sanctioned and sustained by the decision of the highest State court.*

And in so sanctioning and sustaining this taking the State, by the judgment of its courts, has deprived the plaintiff of its property without due process of law; for the due process clause, unlike the contract clause, extends to all exertions of State power, whether executive, legislative or judicial—"to every person whether natural or juridical who is the repository of State power"; and "whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is

clothed with the state's power, his act is that of the state."

Home Tel. & Tel. Co. v. *Los Angeles,* 227 U. S., 278, 286, 290, 291;
Chicago, B. & Q. R. Co. v. *Chicago,* 166 U. S., 226, 235;
Raymond v. *Chicago Traction Co.,* 207 U. S., 20, 35;
Cuyahoga River Power Co. v. *Akron,* 240 U. S., 462.

These decisions, illustrating the extensive scope of the due process clause, clearly show that even if the acts of the defendants be regarded as the acts of private citizens *and the judgment under review be regarded as constituting the sole act of the State in this case,* it must yet be reviewed and reversed because, under that view, *such judgment in and of itself deprives the plaintiff of its property without due process of law.*

That a judgment of a State Court may deprive a person of his property without due process of law, see, particularly

Chicago B. & Q. R. R. Co. v. *Chicago, supra,* at p. 235;
Scott v. *McNeal,* 154 U. S., 34.

This court decides for itself whether the act sanctioned by the State Court is due process of law.

Grannis v. *Ordean,* 234 U. S., 385, 394;
Scott v. *McNeal,* 154 U. S., 34.

The fact that no resort was had to an appropriation proceeding in order to accomplish the taking—the fact that it was sought to accomplish

the taking without even this compliance with the forms of law—does not show that the taking was not by the State and does not mitigate, but rather aggravates, the wrong.

Cuyahoga River Power Co. v. *Akron, supra.*

See, also, Point IV, *infra.*

Thus we have here a case in which property has been taken, under an assertion of power from the State and with the State's sanction and protection. And this is clearly beyond the power of the State. Many cases might be cited, but one recent decision of this court holding such action to be invalid under the due process clause will suffice.

Ettor v. *Tacoma,* 228 U. S., 148, was a suit to recover damages inflicted upon abutting property in consequence of an original street grading done by a railroad company under authority and direction of the city. At the time the grading was done there was in force a statute that required the city to make compensation for consequential damages due to such grading. While the suit was pending this statute was repealed. The state court held that the right to recover damages was a mere *remedy* and that in consequence of the repealing act the right to compensation was taken away. Upon writ of error from this court the judgment was reversed, it being here held that "the right to compensation was a vested property right" (p. 158). Some of the language of the court is so pertinent that we give it in a parallel column with a paraphrase illustrating its applicability to the case at bar:

"The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation."

The necessary effect of the Northern Ohio Power Company's alleged devotion of the property to a public use, as construed and applied by the court below, was to deprive the plaintiff in error of any remedy to enforce its fixed right to acquire the land. This was to deprive the plaintiff in error of a right which had vested before the alleged devotion, a right which was in every sense a property right. Nothing remained to be done to complete the plaintiff's right to the land except the ascertainment of the amount of damage to the private owners. The right of the plaintiff in error was fixed by the law in force when it acquired its charter, and a right so vested cannot be defeated by subsequent legislation, or by any other exertion of State authority, whether executive or judicial.

There is, moreover, another feature. The plaintiff's property has been taken not only without the payment of any compensation, but also FOR A PRIVATE USE—which is, of course, a plain violation of all constitutional guaranties.

O'Neill v. *Leamer,* 239 U. S., 244, 249;
Union Lime Co. v. Chicago, &c. Co., 233 U. S., 211, 218;
Fallbrook Irrigation District v. *Bradley,* 164 U. S., 112;
Clark v. *Nash,* 198 U. S., 361;
Traction Co. v. *Mining Co.,* 196 U. S., 239, 247, 251, 252;

Shaver v. *Starrett,* 4 Ohio St., 494, 498;
Reeves v. *Treasurer of Wood Co.,* 8 Ohio St., 333;
Smith v. *Atlantic & Great Western R. R. Co.,* 25 Ohio St., 91;
McQuillen v. *Hatton,* 42 Ohio St., 202;
Lake Erie &c. R. R. Co. v. *Hancock Co.,* 63 Ohio St., 23.

The taking was for the use of The Northern Ohio Power Company. This is manifest from the fact that land was conveyed to it (Rec., pp. 147-151), the work of erecting the dam and power plants was done in its name (Rec., p. 78), and the cost of the work was charged to it (Rec., p. 86). Moreover, there is no statute under which the Traction Company can claim for itself the authority to develop hydro-electric power or utilize the Cuyahoga River for that purpose.

The charter of The Northern Ohio Power Company does not appear in the record, having been withheld by the defendants (Rec., p. 117). Hence there is nothing to show that that company was incorporated for any public purpose. Indeed, the record does not even disclose a valid organization of that company for there is no evidence of any subscription to any of its stock or the election of any board of directors.

Parkside Cemetery Ass'n. v. *Cleveland, Bedford* v. *Geauga Lake Tr. Co.,* 93 Ohio St., 161, 112 N. E., 596;
American Ball Bearing Co. v. *Adams,* 222 Fed. 967, per Mr. Justice CLARKE;
Kardo Co. v. *Adams,* 231 Fed., 950.

And this omission is fatal to the defendants' case, for in the absence of any showing that the company was duly organized for a legitimate public purpose there is nothing to substantiate

the claim that its use of the land was a public use.

If, however, it be assumed that the charter of The Northern Ohio Power Company expresses upon its face a valid public purpose, this will not avail to establish that its use is public in view of the evidence put into the record by the defendants themselves.

The purpose expressed in a charter of a corporation is not conclusive in determining the character of the use which such corporation proposes to make of land. The important thing, as said by this court in *Terminal Taxicab Co.* v. *District of Columbia,* 241 U. S., 252, is not what its charter says but what it does; and it is familiar law that, in determining whether or not a use is public, resort may be had, not only to the charter but, also, to evidence *aliundi* as to what the corporation really proposes to do.

Thus in the well-known case of *Matter of Niagara Falls & Whirlpool R. R. Co.,* 108 N. Y., 375, the proposed use was held to be private although the purpose as expressed in the charter was to construct and operate a railroad, which, it was conceded, was a public use; and this conclusion was reached because it appeared from the evidence that by reason of physical conditions the company could perform no service except the carrying of sightseers at Niagara Falls during a limited portion of each year.

Again, in *Matter of Split Rock Cable Road Co.,* 128 N. Y., 408, the articles of incorporation expressed a valid public purpose, viz., the construction and maintenance of tramways, and yet the proposed use was held to be private because it appeared from the evidence that the proposed road connected with no public highway and was to be *operated entirely for the benefit of another*

company, except that "the surplus of the capacity of the road" after supplying the needs of this company "was to be devoted to public use in carrying, in buckets, freight offered to it by any person, providing such freight is suitable to the buckets and the road."

To the same effect is

State v. *Railway Co.*, 40 Ohio St., 504.

So, too, in *Eastern Oregon Land Co.* v. *Willow River Land & Irrigation Co.*, 204 Fed., 516, (C. C. A. 9th Circuit), although the articles of incorporation set forth a purpose which the statute expressly declared to be public, the court resorted to the evidence to ascertain what the corporation really intended to do, and the use was held to be public only because the court was of the opinion that the evidence showed that the thing which the corporation proposed to do was within that declared purpose. One judge dissented because he was of the opinion that the evidence disclosed an intent to use the land for the corporation's own benefit only.

The principle of these cases has been uniformly applied in many others in which corporations really designed to promote private purposes have assumed "THE MASK OF PUBLIC CHARACTER" by expressing a public purpose in the charter.

See,

Note in 22 L. R. A. (N. S.) 77-80.

And no court in this country has been more resolute than the Supreme Court of Ohio has been in looking through the corporate form to the real object intended to be effected.

State v. *Railway Co.*, 40 Ohio St., 504;
Parkside Cemetery Ass'n v. *Cleveland, Bedford & Geauga Lake Traction Co.*, 93 Ohio St., 161; 112 N. E., 596.

See, also,

American Ball Bearing Co. v. *Adams,* 222 Fed., 967, 973, per Mr. Justice CLARKE;

Kardo Co. v. *Adams,* 231 Fed., 950.

What, then, is the real character of the use in this case, having regard, not alone to the corporate purpose of The Northern Ohio Power Company as expressed in its charter but, also, to the real purpose as disclosed by the evidence? Is that use public or private?

The evidence shows that the engineer who did the work of erecting the dam and power plants was hired by the Traction Company and was under its direction (Rec., p. 79); that the Northern Ohio Power Company never expended a dollar of its own upon the land (Rec., pp. 86, 231); that all the expenditures were advanced by the Traction Company (Rec., pp. 86, 88, 89, 231); that no consideration was paid by the Traction Company to the Power Company at the time of the conveyance of the property, to the Traction Company in February, 1914 (Rec., p. 231), except that "as a matter of bookkeeping" the items of cost entered upon the books of the Traction Company as an open account against the Power Company were charged off at the time of the conveyance (Rec., p. 231); that the auditor of the Traction Company had possession of the books of the Power Company, *i. e.* "what books they have" (Rec., p. 86), which books the Traction Company's counsel refused to produce at the trial (Rec., p. 117); and that despite his possession of the books this auditor of the Traction Company did not know anything about its issue of any stock or bonds in any way (Rec., p. 87).

The evidence further shows that *as soon as the*

dam and power plants were completed they were promptly turned over to the Traction Company.

Thus it appears that The Northern Ohio Power Company's so-called devotion of the land to a public use is nothing but "the mask of public character," assumed in order to enable the Traction Company to supply itself with a facility which it could not obtain under its own charter.

Recognizing and confessing itself to be utterly without any right, power, or authority to construct the plants even upon land which it now claims was its own property—without authority, in other words, to devote its own property to this alleged public use—the Traction Company claims to have accomplished that result *through and by means of another corporation.* And the control which the Traction Company apparently manifested over every act of the Power Company leads irresistably to the conclusion that the Power Company was nothing at all but a "dummy" for the Traction Company.

Whether the use thus disclosed is public or private is a question which this court will determine for itself. Hence the judgment under review is not conclusive on that point. But this court also pays great respect to State decisions clearly indicating the local policy.

See cases cited on p. 55, ante.

And where, as here, the local policy is clearly expressed in several well considered opinions of the highest State court rendered both before and after the judgment under review, while the judgment under review is not accompanied by any opinion and is really by an inferior State court, it is clearly the duty of this court to follow these other decisions in preference to the sporadic instance immediately before it.

Long before the judgment under review was

rendered, it had been established in Ohio that in order to make a use public it must be one which is "open to the use of the public, under reasonable regulations, as a matter of right and not merely of favor" (*Giesy* v. *Cincinnati, W. & Z. R. R. Co.*, 4 Ohio St., 308, at p. 327; *Shaver* v. *Starrett*, 4 Ohio St., 494, at p. 499); that it must be established *pursuant to a legislative determination*, direct or delegated, that the use is demanded by or conducive to the public health, convenience or welfare. (*Reeves* v. *Treasurer of Wood Co.*, 8 Ohio St., 333; *Smith* v. *Atlantic & Great Western R. R. Co.*, 25 *Ohio St.*, 91); and that where the use is sought to be established by a *corporation*, such corporation must be "a public instrumentality" (*Giesy* v. *Cincinnati, W. & Z. Co., supra*, at p. 327) and must have been granted, by a valid law, both "corporate existence, and the power to take private property for public uses." (*Atkinson* v. *M. & C. R. R. Co.*, 15 Ohio St., 21, at p. 33).

These decisions never have been overruled or questioned, save as their doctrine has been departed from in the case at bar. On the contrary, the principle involved in *Reeves* v. *Treasurer of Wood County* and *Smith* v. *Atlantic & Western R. R. Co., supra*, was applied in *Wallace* v. *Clifton Land Co.*, 92 Ohio St., 349, decided in July, 1915.*

And the principle of *Atkinson* v. *M. & C. R. R. Co., supra*, has been very recently reiterated in two cases, which, by a strange coincidence, involve another "dummy" created by the very Traction Company which appears as defendant here.

State ex rel. Atty. Gen. v. *Cleveland, B. & G. L. Tr. Co.*, decided by Court of Appeals, Second District, not reported,

*These three cases are more fully set forth on pp. 81, 82, 85-87, *infra*.

but printed in full in Appendix to this brief.

Parkside Cemetery Ass'n v. *Cleveland, B. & G. L. T. Co.*, 93 Ohio St., 161; 112 N. E., 596.

From these cases it appears that in 1906 the Traction Company procured the filing of articles of incorporation of the Cleveland, Bedford & Geauga Lake Traction Company and went through the form of effecting its corporate organization in the manner prescribed by the Ohio statutes. In 1911 this so-called Cleveland, Bedford & Geauga Lake Traction Company commenced a proceeding to appropriate property of the Parkside Cemetery Association. The Insolvency Court of Cuyahoga County sustained the proceeding, and its judgment was affirmed by the Court of Appeals, Eighth District, *the same court that rendered the judgment now under review.* Thereupon a suit in *quo warranto* was brought *in a different Court of Appeals* by the Attorney General of Ohio to obtain a judgment of ouster against the so-called Cleveland, Bedford & Geauga Lake Traction Company. In that suit the court found that the company *"is and always has been the 'dummy' of The Northern Ohio Traction and Light Company" and that its appropriation of property "was for the benefit of the Northern Ohio."* It was said further (Appendix, p.):

> "It is no answer to say that The Northern Ohio could legally have built this new line without the use of a dummy. For the question is not what The Northern Ohio could or could not do, but what the defendant did do. • • • *In appropriating land for the benefit of another company and in transferring such land to that company, the defendant has misused its corporate franchise."*

For these reasons the court "ousted the defendant from the right and privilege thereafter of appropriating private property." The judgment of ouster provided, however, that it should be without prejudice to the rights of the defendant with respect to appropriation suits already pending, and it was by virtue of this proviso that the case last above cited came before the Ohio Supreme Court. In that case the Supreme Court (reversing the identical Court of Appeals which rendered the judgment now under review) held that the "dummy" *did not even have corporate existence* and that *in no event could it use corporate powers for the purpose of acquiring property for The Northern Ohio Traction and Light Company.* We quote from the opinion:

> "In order to further sustain the issue on its part the defendant, in the insolvency court, tendered considerable evidence which tended to show that the plaintiff company was *endeavoring to acquire a right of way for the sole use and benefit of the Northern Ohio Traction & Light Company, and that the latter company had furnished considerable of the money, and, as the defendants claimed, all of the money, that the plaintiff company ever had.* On objection being made by the plaintiff company all of this testimony was rejected by the court. In defense of this ruling a number of authorities are cited by the defendants in error in support of the proposition that it is no objection that the organization of a plaintiff corporation was promoted or procured by another corporation, or its stockholders, which is especially interested in the enterprise for which the plaintiff was formed *and which could not condemn property in furtherance of such enterprise,* and that such matters cannot be set up in answer to the plaintiff's petition to condemn.

"The soundness of this proposition is not questioned. It is easy to conceive of a situation in which it would contribute to the public welfare, instead of being a detriment to it, if one corporation should lend assistance, financially and otherwise, to the carrying out of the purposes of another corporation which was *duly organized and actually proceeding with the performance of its corporate duties and the exercise of its corporate rights in the accomplishment of the purposes of its organization.* BUT IT IS A VERY DIFFERENT THING WHEN ONE CORPORATION CAUSES A 'DUMMY' CORPORATION TO BE ORGANIZED, EVEN IF ALL THE FORMS OF THE LAW SHOULD BE FULLY COMPLIED WITH, IF THE LATTER HAS NO REAL AND BONA FIDE PURPOSE OF ITS OWN AND NO INTENTION TO ATTEMPT TO ACTUALLY CARRY OUT THE OBJECT OF ITS ORGANIZATION AS SET OUT IN ITS ARTICLES OF INCORPORATION. It is provided in Section 8759, General Code, that:

> 'A company or municipal corporation which owns or operates a railroad may enter upon any land for the purpose of examining and surveying its railroad line, and appropriate so much thereof as is deemed necessary for its railroad.'

"If, as claimed, the plaintiff had no money or resources of its own and no real expectation of any, but was being used solely by another, it is hard to imagine the necessity of land for its railroad. In construing this language in the original statute from which it is taken, this court, in *Platt* v. *Pennsylvania R.*, 43 Ohio St., 228, 239; 1 N. E., 420, 426, approves of the following from the Supreme Court of Indiana:

> *'A railroad company has no authority to appropriate land for the use of another company,' and 'there is no authority of law*

for several railroad companies to agree that one of their number shall proceed to appropriate land for the purpose of afterward dividing it for the benefit of all; each company must proceed for itself.'

"The defendant should have been permitted to prove, if it could have done so, and should have been permitted to offer testimony tending to prove, that the plaintiff company was not proceeding in the case to appropriate land for 'its railroad,' but *was proceeding to do so for another company.* The rejection of the testimony tendered was a denial of a substantial right. The plaintiff was entitled to maintain the proceeding only when it appeared that it was the real party in interest. Section 11241, General Code."

The similarity between the case just cited and the case at bar is exceedingly striking. There the Traction Company attempted to create another corporation in order to exercise powers which it either could not or did not desire to exercise for itself, and sought to use its "dummy" in order to appropriate property to a public use. The identical scheme has been attempted in this case. The Northern Ohio Power Company, as appears from this record, never did any business and never had any "real and *bona fide* purpose of its own and no intention to attempt to actually carry out the object of its organization as set out in its articles of incorporation," and, in fact, never had any purpose whatever, *except to be used as a device by which the Traction Company might erect dams and power houses for its own use.* The record, furthermore, affirmatively shows that the land was conveyed to The Northern Ohio Power Company at the commencement of the work of erecting these

structures *and was immediately taken away from it as soon as the structures were completed.* To say that it devoted land to a public use is nothing short of an absurdity. *At the very moment at which the time for public service arrived, it was promptly divested of every asset and franchise it possessed* (Rec., pp. 95, 99, 151, showing that the hydro-electric plant was completed about December, 1913 or January, 1914, and was conveyed to the Traction Company in February, 1914). Whether the Traction Company could have erected these structures and used the land in question for the generation of power "without the use of a dummy" (as said in the *quo warranto* proceeding above mentioned) is wholly immaterial. *The fact is that it attempted to do it by means of a dummy;* and according to the law of Ohio, as settled in the *quo warranto case,* the attempt of The Northern Ohio Power Company to exercise its franchises *for the use and benefit of the Traction Company* is such a misuse of those franchises as justifies a judgment of ouster, if, indeed, under the ruling of the Supreme Court in the *Cemetery case,* it ever had any corporate existence or corporate franchise at all.

As in the case of the so-called "Cleveland, Bedford & Geauga Lake Traction Company" the Ohio courts affirmatively decided that by reason of its connection with and dependence upon the Traction Company it could not appropriate property or even exist as a corporation, so here it must be held that although the ostensible purpose of the so-called Northern Ohio Power Company as expressed in its charter may have been public, its use of the land here in question was not for the performance of that public service and is essentially private.

It must be observed, too, that the fact that the

question as to the existence and powers of The Northern Ohio Power Company does not here arise in a *quo warranto* proceeding or in a case in which the Power Company is seeking to appropriate property by means of a formal condemnation proceeding, in no wise affects the applicability of the cases cited to the case at bar; nor can there be any question of the right of the plaintiff to challenge the validity of its attempted exercise of its corporate franchises. For the settled rule in Ohio is that

> "Whenever an incorporated company, in any action, asserts a right against another person based upon an assumed franchise or power, the person against whom the right is so asserted may, as a defense, deny the existence of such franchise or power."
>
> *Zanesville* v. *Gas Light Co.*, 47 Ohio St., 1;
>
> *Parkside Cemetery Association* v. *Cleveland, B. & G. L. T. Co., supra.*

The same rule was expressed in *Milville Gas Light Co.* v. *Vineland Light & Power Co.*, 72 N. J. Eq., 305, where it was laid down as a general rule that an attempt to exercise a franchise without legislative authority is, not only an unlawful usurpation, but, also, an invasion of the rights of anyone upon whom the franchises had been conferred.*

The assertion of the use of The Northern Ohio Power Company as a public use when it is in reality a mere "dummy" for another corporation, is clearly an invasion of the rights of the plaintiff

* This case was cited with approval by the New Jersey Court of Errors and Appeals in *Public Service Gas Co.* v. *Board of Public Utility Comrs.*, 87 N. J. Law, 581, 589. See, also, *Landes* v. *Milville Gas Light Co.*, 72 N. J. Eq., 347.

upon which the right to appropriate the property to a real public use has been conferred; and the validity of that attempt may be questioned and denied by the plaintiff.

In *American Ball Bearing Co.* v. *Adams,* 222 Fed., 967, Mr. Justice CLARKE, as District Judge, considered the question of corporate organizations in Ohio and squarely ruled that although the statute of Ohio authorize corporations, within prescribed limits, to become stockholders in other corporations, *this does not give any corporation "the power to create a corporation, and to control it"* (222 Fed., 975). In that case three private business corporations attempted to organize a fourth by causing certain individuals having no interest in the corporation to execute the necessary papers and go through the form of subscribing to stock and electing a board of directors. This attempt, it was held, was ineffectual and did not result in the creation of any corporation.

The decision of Mr. Justice CLARKE was reversed by the Circuit Court of Appeals for the Sixth Circuit in *Kardo Co.* v. *Adams,* 231 Fed., 950, the latter court holding that, *no fraud appearing,* the *representatives* of a corporation may subscribe for it to the capital stock of another corporation caused by it to be formed by them, and that, in that case, there was created at least a *de facto* corporation, the existence of which could not be called in question *by anyone who had done the corporation a wrong.* The court recognized, however, that although one corporation might thus, in effect, create another corporation, *the corporation so created would not have any power of eminent domain.*

It is thus settled by controlling decisions that although The Northern Ohio Power Company's

charter expressed a public purpose upon its face, and though its use would have been public if it had been validly organized in good faith for the purpose of accomplishing that purpose, yet, inasmuch as it was a mere "dummy" whose only service was to act as a catspaw for another corporation, its real purpose is not public, but private, and its taking of the plaintiff's property is a taking for a private use.

The scheme adopted by the Traction Company of creating a corporation having the charter power to utilize a river for the development of power, conveying the land to it, and having that company build the dam and power plants, may have been the product of a mistaken notion of the law. But the *Cemetery Case, supra,* announced no new principle; it had been anticipated by Mr. Justice CLARKE in the *Adams case, supra;* and, as the opinion clearly shows, it but followed and applied the doctrine of earlier decisions.

This court, therefore, may not relieve the Traction Company from the effects of its own violation of the law by attributing to it an intent not to violate it. The evidence fully establishes its intent to act through and by means of its "dummy," The Northern Ohio Power Company, and that is what it has done. It will therefore, avail nothing to urge that the Traction Company itself might have devoted the land to a public use (a contention which we submit is wholly untenable but which it is unnecessary to discuss upon this record). The case must be determined not by what might have been done, but by what was done. And so determined, it must be held that the taking of the plaintiff's property is not for a public use.

POINT IV.

The plaintiff has been deprived of its property without due process of law, in that its property has been taken without notice, not in the course of legal proceedings established by law for cases of a like nature, and by a "dummy" corporation having no legal authority to take it.

The Constitution and statutes of Ohio provide a regular proceeding in the courts of the State wherever private property is sought to be taken for a public use (*Ohio Constitution*, Art. I, § 19; *Ohio General Code*, §§ 11038-11091).

Among the requisites are that the corporation seeking the appropriation must file a verified petition containing a specific description "of each parcel of property, interest, or right, within the county, sought to be appropriated" (*Code*, § 11042). A summons upon the petition must be issued and served (*Id.*, § 11044), and upon the return of the summons the probate judge must determine the questions of the existence of the corporation, its right to make the appropriation, its inability to agree as to the compensation to be paid, and the necessity for the appropriation (*Id.*, §§11039 and 11046). Upon all these questions the burden of proof is upon the corporation seeking the appropriation (*Id.*, § 11046). The owner of each parcel is entitled to a separate trial (*Id.*, § 11048) and the compensation must be assessed by a jury (Constitution, Art. I, § 19; Code, § 11047 *et seq.*).

None of these requisites has been complied with in the taking of the plaintiff's property. The taking has been accomplished without any pro-

ceeding against or notice to the plaintiff, and, most important of all, *the taking has been accomplished by an alleged corporation which has not proved its corporate existence, its right to make the appropriation, or the necessity for the appropriation.*

Due process of law means at least "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private right"; and "to give such proceedings any validity, there must be a tribunal competent by its Constitution—that is, by the law of its creation—to pass upon the subject matter of the suit."

> *Scott* v. *McNeal*, 154 U. S., 34, 46;
> *Pennoyer* v. *Neff*, 95 U. S., 714, 733.

And a fundamental requisite is the opportunity to be heard.

> *Granniss* v. *Ordean*, 234 U. S., 385, 394, and cases there cited.

Upon this ground alone, therefore, the plaintiff has been denied due process of law; for the course of legal proceedings prescribed by the Constitution and statutes has not been had in this case and the plaintiff has been thereby deprived of an opportunity to be heard upon the questions as to the corporate existence of The Northern Ohio Power Company and its right to make the appropriation.

It may be said that it had the right to introduce rebutting evidence on that subject upon the hearing of this proceeding; but this is a very different opportunity from that which it would have been accorded in an affirmative pro-

ceeding brought by The Northern Ohio Power Company against it. In such a proceeding the issue would have been known in advance, instead of coming as a surprise in the midst of a trial, and by express provision of the statute the burden of proof upon those questions would have been upon The Northern Ohio Power Company instead of upon the plaintiff (*Code*, § 11046, *supra*). The opportunity to meet a known issue with the burden of proof upon the other side is manifestly different from the opportunity to disprove an issue suddenly arising in a case in which the issue has not been presented by any pleading or statute.

It may be said, also, that the State court, by the judgment under review, inferentially has upheld the sufficiency of the process by which the plaintiff's property has been taken in this case. But that is not controlling here (*Granniss* v. *Ordean*, 234 U. S., 385, 394; *Scott* v. *McNeal*, 154 U. S., 34, 45). And we submit with confidence that this court will not sustain as due process of law a taking of property which is accomplished without any compliance whatever with the mandatory provisions of the statutes of the State, especially where, by reason of such non-compliance, the opportunity to be heard upon the question of the right to take is, in effect, denied.

There is, moreover, still another respect in which due process of law has been denied in this case.

In *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 223 U. S., 390, 400, this court adverted to the necessity for due process of law in the taking of property for a public use and then added, by way of definition of the phrase "due process" in that connection:

> "that is, *a law authorizing it* and provisions made for compensation."

The same thought was expressed in *Lamb & McKee* v. *Lane*, 4 Ohio St., 167 (quoted *infra*, p. 89, 90), and in *Atkinson* v. *M. & C. R. R. Co.*, 15 Ohio St., 21, where it was said to be requisite that the corporation have conferred upon it by a valid law "both corporate existence and the power to take private property for public use." And this, indeed, is but the statement of a familiar fundamental principle.

Lewis, Eminent Domain, Sec. 367;
California v. *Pacific Ry. Co.*, 127 U. S., 1, 40;
Cemetery Case, supra, at p. 164 of 93 Ohio St.

In the case at bar, the proof affirmatively shows that the alleged corporation, by means of which the taking of the plaintiff's property was effected, is but a "dummy"; and in view of the decision of the Ohio Supreme Court in the *Parkside Cemetery case, supra*, it is settled that it has no right to appropriate property and cannot even exist as a corporation.

Thus we have here a case in which property has been taken for an alleged public use but without the authority of the legislature. The essential requisite of "a law authorizing it" is completely lacking.

POINT V.

The defendants' alleged devotion of the land to a public use, as given effect by the State court, is a subsequent exertion of legislative power which impairs the obligation of the plaintiff's contract.

It is apparent that the whole object of the Traction Company's appearance and defense in this

case was to establish its right to hold the land as against the plaintiff; and it was through The Northern Ohio Power Company's alleged devotion of the land to a public use that it sought to accomplish this purpose. The judgment of the State court gives effect to the Traction Company's claim—it sanctions and legalizes the alleged devotion and makes complete and permanent the protection which it was the object of the defense to obtain. Thus, it was the aim of the defense and it is the effect of the judgment to give vitality and operation to an act (*i. e.*, the asserted devotion of the land to a public use) which obviously and patiently impairs the obligation of the plaintiff's contract if, as shown in Point II, a contract really exist. It must follow, therefore, that this court has the power and the duty to enforce the constitutional guarantee embodied in the contract clause if the act to which the State court has thus given effect be, in truth, *a subsequent exertion of legislative power.*

> *Louisiana Ry. & Nav. Co.* v. *New Orleans,* 235 U. S., 164, 170, 171, of which the foregoing is a paraphrase.

Although the contract clause of the Federal Constitution be a restraint upon *legislative* power only,

> *Ross* v. *Oregon,* 227 U. S., 150, 161, 162;
> *Cleveland & Pittsburg R. R. Co.* v. *Cleveland,* 235 U. S., 50, 53;

it is well settled:

(1) that any act, from whatever source arising, to which the State gives the force of law, is a law within the meaning of that clause;

> *Reinman* v. *Little Rock,* 237 U. S., 171, 176;

Atlantic Coast Line v. *Goldsboro*, 232 U. S., 548, 555.

(2) that the clause reaches "*every form in which the legislative power of the State is exerted*, whether it be a constitution, a constitutional amendment, an enactment of the legislature, a by-law or ordinance of a municipal corporation, or a *regulation or order of some other instrumentality of the state exercising delegated legislative authority;*"

Ross v. *Oregon, supra*, p. 163.

(3) that the clause extends to any "subsequent exertion of the legislative power of the State";

Cross Lake Club v. *Louisiana*, 224 U. S., 632, 638.

(4) that it was intended to prohibit "every mode or device" having the purpose of impairing the obligation of contracts, that its "prohibition is universal" and is directed against the "exertions of sovereignty which the citizens, unless protected by the organic law, would be impotent to resist, *whether boldly declared in an explicit law or disguised in an ambiguous form*";

Carondelet Canal Co. v. *Louisiana*, 233 U. S., 362, 378.

(5) that where an act is done *under an assertion of power from the State, or under color of authority of State laws*, which could be done only upon the predicate that there was such power, and which if done would result in violating the Constitution, such act is the act of the State even though the consummation of the wrong be not

within the powers possessed, and, indeed, may be actually forbidden by the State Constitution.

> *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S., 278, 287, 288, 295, 296;
> *Cuyahoga River Power Co.* v. *Akron*, 240 U. S., 462.

Hence, even though, in the case at bar, the invasion of the plaintiff's rights should be held not to arise from any subsequent act of the legislature in the narrow and formal sense of a new enactment placed upon the statute book, and although the act constituting the invasion be "wrongful from the point of view of the State Constitution and statute" (227 U. S., at p. 292),* yet, inasmuch as the State Court has sustained and given effect to the act, and inasmuch as the act is legislative in character, that act has "by virtue of State authority, the force of State law" (235 U. S., at p. 171).

That the State Court has given effect to the act and that it operates to impair the contract, abundantly appears from what has been said: that the act is *legislative in character* may deserve a further word.

If the Traction Company and The Northern Ohio Power Company had acquired their title to the land by condemnation rather than by contract, the true character of the alleged devotion of it to

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* See, also, *United States* v. *Reynolds*, 235 U. S., 133, 148, 149; *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S., 151, 160; and *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S., 478, 484, as settling the principle that the validity of State statutes must be judged by their operation and effect upon rights secured by the Federal Constitution, and although such statutes be fair and legal on their face, yet if so administered as to have the effect of denying such rights, they must fail; or, in other words, although "the law of the State as written" be not subject to attack, "the law as administered and justified by the Supreme Court of the State" may be violative of the Federal Constitution. And to the same effect is *Detroit United Ry.* v. *Michigan*, 242 U. S., 238, 247.

a public use as *an exertion of the legislative power of eminent domain* would have been clearly apparent. The circumstance that it happened to be unnecessary for them to resort to an adversary proceeding against a hostile owner in order to acquire title to the soil does not change the character of their act, and though it may have obscured, it cannot obliterate, the fact that their act is, inherently and essentially, an exercise of that legislative power.

If the land, in the condition it stood at the time the plaintiff's contract was obtained, were subject to the plaintiff's right to acquire it—if the plaintiff then possessed the right to acquire it—then any act which defeats or even substantially interferes with that right is a "taking" of the plaintiff's property.

Callen v. *Electric Light Co.*, 66 Ohio St., 166, 177;
Mansfield v. *Balliett*, 65 Ohio St., 451, 464, 476;
Pumpelly v. Green Bay Co., 13 Wall., 166, 177;
Lewis, Eminent Domain, §§ 63, 64, 65.

And as the alleged devotion, as given effect by the State Court, does defeat the plaintiff's right, and as the taking is for an alleged public use, the character of the act as an exercise of the legislative power of eminent domain is manifest.

It is, indeed, one of the anomalies of this case that a proceeding instituted by the plaintiff for the appropriation of property has resulted in its own property being appropriated; for it is important to bear in mind that although the Traction Company appeared as a defendant and, in form, interposed a mere defense to the plaintiff's proceeding, it in fact, has been awarded *affirma-*

tive relief in that it has been accorded, through The Northern Ohio Power Company, the right to appropriate the plaintiff's property to its own use. That is to say, if the plaintiff's right to acquire the land be a property right to which the land was subject or subservient, no one could obtain a full title to the land or a right to use it for any purpose inconsistent with the plaintiff's use without acquiring this right of the plaintiff and paying just compensation therefor; and as the judgment under review in effect gives to the Traction Company such a full title and right of exclusive use, free of any claim of the plaintiff, the judgment obviously has all the effect of a judgment in an appropriation proceeding brought against the plaintiff. In short, in this proceeding the power of eminent domain has been exercised *against* the plaintiff.

Apart from this feature, however, it is a fundamental principle that *the devotion of property to a public use is a governmental function, a prerogative of sovereignty, and can be accomplished only by the State or "some instrumentality of the State exercising delegated legislative authority"* (227 U. S., 163). It is, in short, an exercise of the legislative power of eminent domain *even though the corporation making the devotion be able to acquire the title of the private owner by contract or agreement without the necessity of a formal appropriation proceeding.*

This has been squarely ruled by the Supreme Court of Ohio in two cases in which the devotion to railroad uses of lands *purchased* by railroad companies was held to be an exercise of the power of eminent domain.

Doan v. *Cleveland Short Line Ry. Co.*,
92 Ohio St., 461, 112 N. E., 505;

Ward v. *Cleveland Ry. Co.*, 92 Ohio St., 471; 112 N. E., 507.

In each of these cases the plaintiffs were owners of certain lots which had been laid out upon a uniform plan and sold with the restriction that they should be used exclusively for residence purposes. The defendants had *purchased* some of the lots with knowledge of these restrictions, but, in disregard thereof, were proceeding to use them for railroad purposes. The *Doan case* was an action at law for damages, the claim being that the Railroad Company's use of its lots for railroad purposes was a taking of the plaintiff's property without compensation. The *Ward case* was a suit in equity to enjoin the defendant from using its lots for railroad purposes in violation of the covenants contained in the deeds. In each case the plaintiffs were denied relief. In the opinion in the *Doan case* the court stated that such covenants were recognized and given full force and effect between private owners of lots and that such private owners could be enjoined from using the lots for other purposes. But it then said:

> "The case at bar, however, is one at law, in which plaintiff seeks to recover compensation by way of damages resulting from the taking of an alleged property right which she claims to have had in the lots of the defendant, a railroad company organized under the laws of the State and *possessing the right of eminent domain.* It is *the owner of a number of lots* in the allotment and at the time of the commencement of this action was building a railroad on and over *its property.* IT WAS DEVOTING THESE LOTS TO A PUBLIC USE. If plaintiff is entitled to compensation by way of damages by reason of the use of this property by the railroad company, a right

must grow out of the covenant in the deeds of the allotter and the general plan adopted which restrict the use of the property to residence purposes. If such restriction is not to be construed as preventing the use of the property for public purposes, then, of course, there is no violation on the part of the defendant, and it follows that no recovery can be had. If, on the other hand, it is to be construed as prohibiting the use of the property for any purpose other than that of residences, it would prevent a public use of the lots *and thereby defeat the* RIGHT OF EMINENT DOMAIN. No covenant in a deed restricting the real estate conveyed to certain uses and preventing other uses can operate to *prevent the State, or any body, politic or corporate, having the authority to exercise the right of eminent domain from devoting such property to a public use.* The right of eminent domain rests upon public necessity, and a contract or covenant or plan of allotment which attempts to prevent the exercise of that right is clearly against public policy and is therefore illegal and void.

* * * * * * *

"We are constrained to the conclusion that restrictive covenants in deeds or a general plan for the improvement of an allotment cannot be construed to *prevent the use of the lots for public purposes, and as against the State or any of its agencies which are vested with the right of eminent domain are illegal and void, confer no property right and cannot be the basis of a claim for damages.*"

And in the *Ward case* it was said:

"It appears from the amended petition that the defendant in error is a street railway company, organized under the laws of the State of Ohio, owning and operating a sys-

tem of street railways in the City of Cleveland and its adjacent and contiguous suburbs, and *vested with the right of eminent domain.* It is *the owner by purchase* of six lots in the allotment in question, and plaintiffs are asking that the company be enjoined from using the property for railway purposes. The covenants in the different deeds restricting the use of the lots in the allotment to residence purposes are *not binding upon a corporation possessing the right of eminent domain. Doan* v. *Cleveland Short Line Ry. Co., ante,* 461. The demurrer to the petition was properly sustained, and the judgment of the Court of Appeals is therefore affirmed."

The principle of the cases just cited as proceeding upon the theory that the act of devoting one's own property to a public use is an exercise of the power of eminent domain is pointedly emphasized by another decision of the Ohio Supreme Court rendered the same day.

Wallace v. *Clifton Land Co.,* 92 Ohio St., 349, 110 N. E., 940.

In that case lot owners who had purchased lots according to a general plan whereby uniform restrictions were imposed limiting the use of the land to residence purposes sought to enjoin *a real estate company* from devoting some of the lots which it had acquired under the same restrictions to road and street purposes. It was argued for the Land Company that its use of the lots for road and street purposes was a devotion to a public use and "that the public has the right to take private property for public use whenever it becomes necessary, and that no contract can be made that will prevent the state or any body politic or corporate, *having the right of eminent domain,* from appropriating private property to a public use." The

court stated that that was a "self-evident proposition" but "it is not the case presented for review." It then said:

> "These *private proprietors* have undertaken to create a public thoroughfare through this addition and over the lands subject to these restrictions. *Public ways cannot be established in this manner.* The need of such thoroughfares is *a question to be determined by the public authorities.* When these authorities have determined the necessities of such ways, private property can be taken for such use, regardless of restrictions or limitations placed upon the same by deed, contract or otherwise, and when established, these ways come under the control of the public authorities, whose duty it is to keep them in repair, free from nuisance and open for public travel. The question whether the owners of other lots in this addition have any property interest in these lots that would require them to be compensated before being taken for public use does not arise in this case.
>
> "It is said in argument that these lots have already been deeded to the City of Lakewood for street purposes, but *no presumption obtains that the city will accept such grant,* for this carries with it burdens of construction, maintenance, care and control that the city authorities may not care to assume.
>
> "The only question presented in this record is the question of the right of The Clifton Land Company to devote these lots, covered by these restrictions, to street purposes, and that question must be answered in the negative."

Thus in these three cases the highest court of the State has determined (1) that a devotion of property to a public use cannot be accomplished

by the act of the owner alone unless he have the power of eminent domain—some public authority must determine the need for the use and accept the devotion; (2) where an owner having the power of eminent domain devotes his property to a public use such devotion is an exercise of that power.

The same principle has been likewise applied in this court.

In *California* v. *Pacific Ry. Co.*, 127 U. S., 1, 40, this court said:

> "Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern, *which ought not to be exercised by private individuals at their mere will and pleasure,* but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. *Under our system, their existence and disposal are under the control of the* LEGISLATIVE *department of the government, and they cannot be assumed or exercised without* LEGISLATIVE *authority.* NO PRIVATE PERSON CAN ESTABLISH A PUBLIC HIGHWAY, OR A PUBLIC FERRY, OR RAILROAD, OR CHARGE TOLLS FOR THE USE OF THE SAME, WITHOUT AUTHORITY FROM THE LEGISLATURE, DIRECT OR DERIVED. THESE ARE FRANCHISES. No private person can take another's property, even for a public use, without such authority; which is the same as to say that the right of eminent domain can only be exercised by virtue of a legislative grant. This is

a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely."

And this must be so, else it is within the power of any and every private citizen to determine for himself when the public welfare requires the employment of property in a certain public use, what property shall be devoted to that use, when and how the devotion shall be made, the length of time it shall continue, the amount of property necessary to be employed, and, in fact, all the questions that are determined by the legislature or its agent in the ordinary and usual exercise of the power of eminent domain. And this, too, despite the fact that the State itself has said the property shall be devoted to some other use.

The case at bar is an illustration: The State has determined that the Cuyahoga River shall be devoted to the public use of developing and furnishing light, heat and power to the general public and has created the plaintiff as its agent for the accomplishment of this purpose. The defendants assume to say that the accomplishment of this purpose shall be prevented in order that they may utilize a small fraction of the river for their own purposes. They have assumed to determine that the public welfare demands that the land in controversy be utilized for their power house, that the land is necessary for their use, and that by reason of their own determination of these questions the land cannot be devoted to the plaintiff's use.

Their act, in short, involves a determination of every question that is assumed to be in the mind of the legislature when it determines upon an exercise of the power of eminent domain.

It is for the legislature to say if, when, and by whom, a particular parcel of land within its jurisdiction shall be devoted to a specified public use. It may say this either directly or through its duly authorized agent. But certainly no individual or corporation can determine these questions unless the authority therefor has been delegated to it by the legislature.

Wallace v. *Clifton Land Co., supra;*
Reeves v. *Treasurer of Wood County,* 8 Ohio St., 333.

In the case last cited an act of the Legislature giving township trustees the power to appropriate property for opening ditches was held unconstitutional as authorizing a taking of property for a private use because the power of the trustees was general and not confined to opening ditches when they "found the same to be demanded by, or conducive to, the public health, convenience or welfare." The court stated that they saw nothing objectionable in the fact that the trustees were given power to act upon the application of a single party, nor in the fact that they might locate the proposed ditch upon lands held by two owners only, but it then said:

> "But it is a much more serious subject of inquiry, whether this section does not, in effect, authorize the entry upon lands and the construction of drains, when demanded by private interest merely, without reference to the public interest, convenience, or welfare. It seems to us clear that it does. If the trustees had been authorized to locate and provide for the opening of a ditch only in case they found the same to be demanded by, or conducive to, the public health, convenience, or welfare, then their action, under legisla-

> tive authority, would be but an ordinary and legitimate exercise of the right of eminent domain. *But this statute prescribes no such condition*—no such rule of official duty or limit to official discretion; and a ditch may be located and opened upon the lands of individual proprietors solely for purposes of private interest irrespective of the public welfare, without infringing any provision of this act, either express or implied."

A similar ruling was made in *Smith* v. *Atlantic & Great Western R. R. Co.,* 25 Ohio St., 91, in which the court held invalid an act of the legislature that authorized a probate judge of any county to cause levees or embankments to be established or constructed along any stream or watercourse in his county "whenever in his opinion the same will be conducive to the health, convenience or welfare of any number of citizens of the county or is necessary for the protection of the lands of said citizens, or any of them, from overflow." In that case the court said (p. 101):

> "The public welfare is not within the purview of the act, either in express terms or by implication. The action of the probate judge is not limited by the act to cases only in which the location and construction of levees are demanded by the public welfare, 'but under it, and without infringing any of its provisions, a levee might be located and constructed upon the lands of individual owners, for purposes of private interest merely.' "

These decisions make it plain that in order to make a particular use or purpose public rather than private, there must be *a determination that such use or purpose is demanded by, or conducive to, the health, convenience or welfare of the public;* that the power to make that determina-

tion is lodged *in the legislation;* and that no one else may assume to make it unless the authority therefor has been delegated to him by the legislature.

It is also settled by many other decisions in Ohio that although land be actually employed in a use which is public in its nature, it may yet be taken under a general power of eminent domain unless the employment of the property in that use is *pursuant to the power of eminent domain,* or, at least, *for a purpose for which the corporation employing the property was authorized by the legislature to exercise that power.*

Iron R. R. Co. v. *City of Ironton,* 19 Ohio St., 299;

Northern Ohio Ry. Co. v. *Comm'r's of Hancock Co.,* 63 Ohio St., 32;

Railroad Co. v. *Belle Centre,* 48 Ohio St., 273;

Little Miami &c. R. R. Co. v. *Dayton,* 23 Ohio St., 510;

Hatch v. *Cincinnati & Indiana R. R. Co.,* 18 Ohio St., 92, 119.*

AND THAT IS BUT ANOTHER WAY OF SAYING THAT THE DEVOTION OF PROPERTY TO A PUBLIC USE IS A LEGISLATIVE ACT. That is to say, the mere employment of property in a public use does not constitute a devotion of the property to that use in the sense that the property is thereby withdrawn from the reach of a general power of eminent domain; and the obvious reason for the rule, the principle upon which it rests, is that no citizen can of his own motion determine the use to which property shall be put as against the right of one possessing the power of eminent domain to appropriate it for another use. That is the function of the State.

*See quotations from these cases pp. 103-107, *infra.*

This, of course, is in no respect a limitation upon the right of an owner of property to employ it in any lawful use or for any lawful purpose. It only means that he cannot, by employing it in a use of a public nature, in any way impair a right already existing in another to take the land under the power of eminent domain.

Neither do we deny that an owner of property, even though not invested with the power of eminent domain, may so use his property as to cause it to be affected with a public interest and thereby render it liable to regulation by the public authorities.

> *Munn* v. *Illinois*, 94 U. S., 113;
> *German Alliance Ins. Co.* v. *Kansas*, 233 U. S., 389;
> *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S., 252.

That principle is not in conflict with the proposition we have stated. Indeed, the cases cited sustain our position. In each of those cases the legislature declared certain businesses or certain uses of property to be *public*, and the act of the legislature was sustained as against the contention of the owners that the business or use in question was *private*. There was no claim in any of those cases that by the owner's act in making a certain use of his property he had withdrawn it from the power of the State or its authorized agent to take it for such use as the State saw fit. Would anyone contend, for example, that because the business of insurance has been held to be affected with such a public interest as to justify the regulation of rates, property used in that business is withdrawn from a general power of eminent domain merely because of the fact that it is employed in that business? Could an insurance

company, by erecting an office building in the path of a projected railroad, defeat the railroad company's appropriation of the land by the plea that its property was devoted to a public use? Here we have an illustration of the distinction between the mere employment of property in a use of a public nature and a devotion of the property to a public use in the sense of withdrawing the property from a general power of eminent domain. And the distinction lies in the fact that whereas the mere employment of property in a use of a public nature may be accomplished at the mere whim and caprice of the owner, the devotion of property to a public use in the sense of withdrawing it from a general power of eminent domain can be accomplished only by an exertion of State power, *i. e.,* the power of eminent domain; and as that power is legislative in nature, it follows that a devotion of property to a public use in the sense stated is "an exertion of legislative power."

In *Cincinnati* v. *Louisville & Nash. R. R. Co.,* 223 U. S., 390, this court said (p. 400):

> "But the right of every State to authorize the appropriation of every description of property for a public use is one of those inherent powers which belong to state governments, without which they could not well perform their great functions. It is a power not surrendered to the United States and is untouched by any of the provisions of the Federal Constitution, provided there be due process of law, that is, *a law authorizing it,* and provisions made for compensation."

And in *Lamb & McKee* v. *Lane,* 4 Ohio St., 167, the Supreme Court of Ohio, quoting from an earlier case, said (p. 175):

> "Before the owner can, without his consent, be deprived of his land, for the public use, *the legislature must declare by law that the public welfare requires* it, direct the mode of ascertaining its value, and provide for its payment."

Under these authorities it is very clear that if the plaintiff's right to acquire the land be a property or contract right, it could not be deprived of that right by any merely private or individual act of the defendants.

In other words, *the plaintiff's right to acquire the land can be defeated only by an act of the legislature*, and if, as the State court here has held, the defendants' asserted devotion of the land in question to a public use has the effect to defeat that right, such devotion must be, in substance and effect, an act of the legislature—a law of the State within the meaning of the contract clause of the Federal Constitution.

The conclusion that the devotion of land to a public use in such manner as to defeat a prior existing right to acquire the land is a *legislative act* within the meaning of the contract clause may be further demonstrated by approaching the subject from a somewhat different angle.

If the Ohio Legislature had passed an act specifically setting apart the land in question for a particular public use, no one would dispute that such act was a law of the State. So, too, if a municipality, acting under delegated authority from the State, should pass an ordinance of the same character, it would be beyond question that such ordinance was a law of the State. It was expressly so held in *Cuyahoga River Power Co.* v. *Akron*, 240 U. S., 462, which involved an ordinance of that kind.

Now can any distinction be drawn between an act of the legislature or a municipal ordinance which specifically sets apart particular property to a particular public use and a similar setting apart of particular property to a particular public use by *any corporation upon which the legislature has conferred the power to do so?* A negative answer is impelled because the nature of the act in each instance is the same, and the fact that such corporation is exercising delegated authority gives its acts the same force as if made by the legislature.

Can, then, a distinction be drawn on the ground that when the devotion of property to a particular public use is made by the legislature or by a municipality the devotion is expressed in a *written* act, while a similar devotion by a corporation is or may be expressed by mere *physical* acts? A negative answer is again impelled because to so hold would, in the words of Chief Justice WHITE in *Barlow* v. *Northern Pacific Ry.*, 240 U. S., 484, 487, "dominate the substance of things by the mere shadow." And in that very case it was held that an appropriation of a right of way under the Right of Way Act of March 3, 1875, might be made by the physical act of actual entry upon the land quite as effectively as by the filing of the map required by that statute.

Suppose that in the *Akron case, supra*, the city's authority had been vested in its Director of Public Service instead of in the City Council. Would that fact make the act of the Director of Public Service in setting apart the property for water supply purposes any less a law of the State than the ordinance was? And if there were no requirement that the Director of Public Service make his orders in writing, would not his verbal

direction to the City's engineers to go upon the river and erect a dam be just as much a law of the State as the ordinance?

In *Grand Trunk Ry.* v. *Indiana R. R. Commission,* 221 U. S., 400, 403, an order of a Railroad Commission directing the installation of an interlocking plant at the crossing of two railroads was held to be a law of the State within the meaning of the contract clause. Would the same order have been any less a law of the State if it had been verbal instead of written, or if the Commission itself had installed the interlocking plant instead of directing the railroad company to do it, provided the State court gave effect to it? Clearly not. The reason it was held to be a law of the State was that it was legislative in character and, by virtue of State authority, had the force of an act of the Legislature itself. And these are the only requisites necessary to make any act, whether written or physical, a law of the State, within the meaning of the contract clause.

In short, in order for an *act* to be a *law* it is not necessary that it prescribe a rule of action which affects the conduct of every citizen of the State in the same manner and to the same degree. It is sufficient if the act is held by the State court to have the force of State authority and "looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." (*Prentis* v. *Atlantic Coast Line,* 211 U. S., 210, 226; *Ross* v. *Oregon,* 227 U. S., 150, 163). And when the act of devoting property to a public use is held by the State court to change existing conditions and to constitute a new *status* which must be recognized by other persons in their proceedings against the land, such act comes within this definition of *legislative acts* and is a law of the State

for the same reasons and with the same effect as the order involved in *Grand Trunk* v. *Indiana R. R. Commission, supra,* was held to be a law of the State.

In addition to all this, the Supreme Court of Ohio holds that *judicial decisions* that impair the obligation of contracts come within the contract clause of the Federal Constitution.

Thomas v. *State,* 76 Ohio St., 341, 361.

And, under the settled rule that whatever the State court regards as a law of the State will be treated as such by this court, it follows that *even though the plaintiff's contract in this case were impaired solely by reason of the decision below, such impairment would be a violation of the Constitution.*

It only remains now to show that:

The alleged devotion relied upon by the defendants is subsequent in time.

The plaintiff's articles of incorporation were filed on May 29, 1908 (Rec., p.). It completed its organization and adopted its resolution declaring the necessity for the land in question on June 4, 1908 (Rec., pp. 35, 36).

At that time the land was vacant and unimproved and actually employed in no use and for no purpose whatsoever except that a portion of a small inexpensive wooden structure, intended and occassionally used for dancing and roller skating, was situated within its boundaries (Rec., pp. 71, 76).

SUBSEQUENT THERETO there was erected upon the land a dam and other appliances for a hydro-electric plant, which plant has a capacity of 2750 horse-power during a period of about seven or eight months during each year, and is incapable

of operation during the remainder of each year (Rec., pp. 77, 93, 94). Adjacent to this hydro-electric plant there was also erected a steam power plant having a normal capacity of 31,000 horse power and a maximum capacity of about 83,000 horse power (Rec., pp. 77, 90, 94). The main buildings constituting the steam power plant are located *outside* of the land in controversy, but a portion of the foundations extend within its limits (Rec., pp. 80-82, and Deft.'s Ex. J, opposite p. 305). The steam power plant is also connected with the river by means of pipes that are laid under ground from the power house across the land in controversy to the river, and through these pipes the water of the river is pumped to the boilers of the steam power plant for use in the generation of steam (Rec., pp. 90, 91, 92, 94, 96, 97).

The work of clearing the ground for the steam power plant was commenced in December, 1910 (Rec., pp. 78, 79, 83, 90). The plant was completed and commenced operation about December, 1912 (Rec., p. 99, the witness testifying in March, 1914, that it was "Twelve months last December is when we started getting things in operation"). The work of constructing the dam and the other appliances of the hydro-electric plant was not commenced until after January 20, 1911, the date of the commencement of this proceeding (Rec., p. 77, where the witness testifying in March, 1914, says the dam was started "about two years ago—over two years ago"), and was not ready for operation until December, 1913, a few months before the hearing in the Court of Common Pleas (Rec., p. 99, where one witness says this plant commenced working "this December," and p. 95, where another witness says its operation was started "about the second week in January").

The defendant Traction Company claims that the land in controversy and these power plants and dam were subsequently conveyed to it by deed dated *February 24, 1914* (Rec., p. 151), and that at the time of the hearing it was using the electric current generated by these two power plants in connection with its business (Rec., p. 77). On the date of said conveyance the present proceeding was still pending in court undetermined.

THE ERECTION OF THESE POWER PLANTS AND THE USE OF THE ELECTRIC CURRENT GENERATED BY THEM CONSTITUTES THE SO-CALLED DEVOTION TO A PUBLIC USE UPON WHICH THE DEFENDANTS RELY IN ORDER TO DEFEAT THIS PROCEEDING.

AND THIS MERE RECITAL OF DATES CLEARLY SHOWS THAT THE ALLEGED DEVOTION TOOK PLACE LONG AFTER THE PLAINTIFF'S RIGHT TO ACQUIRE THE LAND HAD VESTED, AND, IN FACT, DURING THE PENDENCY OF ITS PROCEEDING TO ACQUIRE IT.

POINT VI.

In rendering its decision the State court necessarily gave effect to the Ohio Public Service Commission Act of June 30, 1911.

Whatever may have been the process of reasoning by which the State court reached its conclusion, it is plain and indisputable that the force of its decision is to abrogate the plaintiff's right to acquire the land—impair this obligation of its contract—in consequence of the legal effect upon the plaintiff's contract which the State court attributed to the various steps and proceedings of the Traction Company, the Realty Company and the Northern Ohio Power Company as disclosed

by the record, including the successive conveyances of the land and the actual use by the Traction Company of the product of the power plants erected in the name of the Northern Ohio Power Company. These various steps and proceedings, which the State court was thus called upon to consider, relate to and involve the inter-corporate relations of three different kinds of corporations operating under three different charters, the organization and control of one public utility corporation by another, and the use by one public utility corporation of the product of another and different public utility corporation. And the substantial part and actual consummation of these various steps and proceedings of these three companies took place after the Ohio Public Service Commission Act of June 30, 1911, was enacted.

That statute brought under the jurisdiction and supervision of the Public Service Commission street railroads, interurban railroads, and also electric light companies—the latter being defined so as to include any person, firm or corporation wherever organized or incorporated engaged in the business of supplying electricity for light, heat or power purposes to consumers within the state (§§ 3 and 4 of the Acts; §§ 614-2 and 614-2a of Ohio General Code); and from the time the statute became effective all persons, firms and corporations subject to the jurisdiction of the Commission could act only in accordance with the statute and the orders of the Commission made pursuant thereto. Among the matters embraced in the statute were the entire subjects of the purchasing, selling, and leasing of the property of one public utility by or to another, the issuing of stock and bonds by public utility and railroad corporations, and the purchasing and holding of the stock of one public utility by another (§§ 56, 57, 63 and

65 of the Act; §§ 614-53, 614-54, 614-60, 614-62 of Ohio General Code).

It follows, therefore, that the validity and effect of the steps and proceedings of the three companies were governed by and must have been determined with reference to the subsequent statute of June 30, 1911, which took effect long after the plaintiff's contract rights accrued; and in giving effect to the steps and proceedings so taken under this subsequent legislation, the state court necessarily gave effect to the subsequent legislation itself.

Under these circumstances, neither the process of reasoning by which the state court reached its decision, nor the precise extent to which reliance was placed upon the subsequent legislation, is material. The subsequent law was there; and the steps and proceedings taken under that subsequent law were given effect. It is therefore impossible to say that the decision of the State court turned upon the meaning, validity or effect of the plaintiff's contract under laws existing when it was made, without reference to the subsequent law.

> *Detroit United Ry.* v. *Michigan,* 242 U. S., 238, 247.

As said in that case, the force of the decision is to abrogate the rights acquired by the plaintiff under its charter, not merely because of some view the State court may have entertained with respect to the existence and extent of the plaintiff's rights under existing laws, but because of the combined effect of those existing laws and the subsequent legislation of June 30, 1911.

POINT VII.

The plaintiff has a vested right to acquire the land despite the defendants' present use of it, because

(A) Even if the use be public there is no devotion of the land to that use pursuant to a lawful exercise of the power of eminent domain, and

(B) Even if there were such a devotion to a public use the plaintiff's right, as fixed by its charter, extends to the acquisition of land already devoted to a public use.

It is, of course, beyond question that, according to the effect given by the State court to the defendants' alleged devotion to a public use, the plaintiff has no right to acquire the land. This indeed, is the basis of our claim of violation of constitutional rights.

But this effect having been given and the case being properly here, this court must consider the further contention that the plaintiff's rights, when properly construed, extend to the acquisition of the land in spite of the defendants' present possession and use of it.

It has become a truism that, in cases coming here under the contract clause, this court determines for itself, not only whether there is a contract, but, also, *the proper construction of the contract* or, in other words the extent of its obligations; and this rule applies even though the State court may have placed its decision upon the ground that the contract was not made, or that it was invalid, or that it has become inoperative,

or has construed it in such manner that the act complained of is not an impairment of its obligations, *i. e.*, has upheld the subsequent legislation on the ground that the contract did not confer the right claimed.

Columbia Water Power Co. v. *Columbia El. Ry. Co.*, 172 U. S., 475, 487;
Mobile & Ohio R. R. v. Tennessee, 153 U. S., 486, 492, 493;
Chicago &c. R. R. v. Nebraska, 170 U. S., 57, 68;
Louisiana Ry. & Nav. Co. v. *New Orleans*, 235 U. S., 164, 170;
Atlantic Coast Line v. *Goldsboro*, 232 U. S., 548;
Russell v. *Sebastian*, 233 U. S., 195;
N. Y. El. Lines Co. v. *Empire City Subway Co.*, 235 U. S., 179;
Northern Pac. R. Co. v. *Minnesota ex rel. Duluth*, 208 U. S., 583, 590;
Muhlker v. *New York & Harlem R. R. Co.*, 197 U. S., 544, 570;
Detroit United Railways v. *Michigan*, 242 U. S., 238.

It is settled, too, that in determining the existence and proper construction of the contract, the decision of the State court, even though involving only the construction of State statutes, is not conclusive.

Grand Trunk Western Ry. v. South Bend, 227 U. S., 544.
Ohio Life Ins. & Trust Co. v. *Debolt*, 16 How., 416, 432;
Jefferson Branch Bank v. *Skelly*, 2 Black, 436;
Bridge Proprietors v. *Hoboken Company*, 1 Wall., 116;

Interborough Rapid Transit Co. v. *Sohmer,* 237 U. S., 276, 284.

And where, as here, the contract arises from a State law this court "treats it as if there was embodied in its text the settled rule of law which existed in the State at the time the State action relied upon as a contract was taken," *later decisions to the contrary outwithstanding.*

Ennis Water Works v. *Ennis,* 233 U. S., 652, 657;

Muhlker v. *New York & Harlem R. R. Co.,* 197 U. S., 544, 570.

The principles of these cases require that (at least in cases depending upon legal construction only) this court exercise the same jurisdiction to determine for itself the existence and extent of asserted *property* rights in cases coming here under the *due process clause,* else it is within the power of the States to smother the Constitution by the device of a finding that certain rights are not property; and this jurisdiction was exercised in *Ettor* v. *Tacoma,* 228 U. S., 148, 155, 158, where a right which the State court had held was a mere remedy was held by this court to be "a vested property right."

It follows from these principles that this court must here determine for itself (*a*) whether, even though the use relied upon by the defendants be a public use, there has been such a *devotion* of the land to that use as will prevent its being taken under the plaintiff's power of eminent domain, and, if so, (*b*) whether the scope of the plaintiff's charter is such that it has a right to acquire the land despite the fact of such devotion, or, in other words, whether the plaintiff's charter gives it the right to acquire property already devoted to a public use. And in determining those

questions it must treat the plaintiff's charter *as if there was embodied in its text the settled rule of law which existed in the State at the time the plaintiff's contract was made.*

Ennis Water Works v. *Ennis, supra.*

We therefore proceed to discuss those questions as to the scope and proper construction of the plaintiff's charter with particular reference to the settled course of decision in Ohio up to the time its charter was obtained.

A.—Although the land be actually employed in a public use, it may yet be taken by the plaintiff because it has not been legally devoted to that use pursuant to the power of eminent domain.

In their arguments below the defendants relied upon the rule that property already devoted to a public use cannot be taken under a mere general power to appropriate, *i. e.*, where the power to take property already devoted to a public use is not granted either expressly or by necessary implication.*

This rule is well established; but mere employment of property in a public use does not constitute a devotion of the property to that use within the meaning of the rule. *The rule applies only where the property has been legally devoted to the use pursuant to the power of eminent domain.*

This does not mean that the mere fact that title to the land was acquired by contract, rather than by an appropriation proceeding, will prevent the application of the rule; but it does mean that the corporation invoking the protection of the rule *must have had the power to acquire the land by an appropriation proceeding,*—the use must be

* The defendants' brief stated the rule rather inaccurately. Perhaps this inaccuracy contributed to the State court's decision.

one for which it could exercise the power of eminent domain.

That this is the true meaning of the rule is recognized by many authorities and particularly the Supreme Court of Ohio.

The rule is founded, says LEWIS,

> "upon the presumption that the legislature did not intend, by a general grant of the eminent domain power, to authorize an interference with the enjoyment of property devoted to a prior use *under prior grants of the same power.*"
>
> *Lewis, Eminent Domain,* § 441.

Thus the very foundation of the rule precludes its application where the devotion has not been under the power of eminent domain.

The same author further says:

> "As to property actually devoted to a public use *by a corporation having the power of eminent domain,* there is probably no distinction between such as has been acquired by contract and such as has been acquired by condemnation."
>
> *Idem,* § 443.

He says also:

> "* * * property acquired in fee simple *by a corporation having the power of eminent domain* and not in use and not legally designated and set apart for public uses, may be taken for public use under a general power the same as though it belonged to an individual, and this though the corporation intended to make use of it for public purposes."
>
> *Idem,* § 443.

and

"*The same rule applies to property acquired by contract and* USED FOR A PURPOSE FOR WHICH THE PROPERTY COULD NOT BE CONDEMNED."

Idem, § 443.

In *Hatch* v. *Cincinnati & Indiana R. R. Co.*, 18 Ohio St., 92, 119, it was said:

"The power of one corporation, in the exercise of the delegated right of eminent domain, to appropriate, without consent, to its own uses what constitutes the material body of another corporation, *and which the latter has obtained by the exercise of a like delegated authority*, is a power so extraordinary, and so susceptible of abuse, that its existence certainly ought not to be inferred from statutory phraseology of doubtful import."

In *Iron Railroad Co.* v. *City of Ironton*, 19 Ohio St. 299, the Railroad Company sought to enjoin the city from condemning for wharf purposes certain land already in use by the Railroad Company as a wharf. It was alleged that the Company had *purchased* the land and was *the fee simple owner thereof*, that it was *using the same for a wharf upon which to receive and discharge freight and passengers*, that it was *necessary for the uses and purposes of the railroad*, that it was entitled to hold the same notwithstanding the general power given to cities to condemn property for wharf purposes, and that to permit the city to take the land would "take away from the plaintiff rights and franchises guaranteed to the plaintiff by law, and prevent the plaintiff from the full exercise of the privileges conferred upon the defendant * * * and will wholly deprive

plaintiff of the landing and wharf upon the Ohio River at the terminus of plaintiff's railroad, which landing and wharf are necessary and essential to the plaintiff in the legitimate and proper use of plaintiff's railroad."

Upon the question whether the property was subject to appropriation by the city the Supreme Court of Ohio said:

> "The plaintiff was incorporated to construct a railroad from the Ohio River, in Upper township, in Lawrence county, to the south line of Jackson county. * * * O. L. L., vol. 47, p. 160.
>
> "By its charter it was declared to be invested with all the powers, and to be subject to all the restrictions and provisions of the act regulating railway companies, passed Feb. 11, 1848. 2 Curwen, 1394; 1 S. & C. Stat., 271.
>
> "By this act the plaintiff was authorized to construct and maintain a railroad with a single or double track, with such side tracks, turn-outs, offices and depots as it seemed necessary, between the points named in its charter; and for this purpose it was authorized to enter upon any lands for the purpose of examining and surveying its railroad line, and to appropriate so much thereof as might be deemed necessary for its railroad, including necessary side-tracks, depots, work-shops, and water-stations.
>
> "So far as the power of the corporation to appropriate private property to public use aids in the solution of the question before us, the foregoing embraces all the authority with which the plaintiff is endowed; and the authority thus given is intended to furnish the necessary territory upon which to operate its road.
>
> "*We find no power given the company to*

condemn or to hold private property to its exclusive use, solely for wharf purposes, nor for streets or ordinary highways. These may be necessary for the convenient transaction of its business; but they are alike necessary facilities for the transaction of the business of the public at large.

"A wharf is a necessary incident to water transportation, and it would doubtless be for the interest of a private merchant or an unincorporated carrier, as well as of the plaintiff, to hold such property exempt from appropriation to public use; but the owner, nevertheless, when the property is required for a public wharf, is compelled to give up his right to the exclusive use, and to submit to the inconvenience of using the property as one of the public.

"We discover no more authority in the statute for the plaintiff, as against the public, to claim exclusive wharf privileges, than it has to exclusive privileges in the river as a highway. As respects such property, we think the company stands upon the same footing as other proprietors.

"The power given to the municipal authorities to condemn property for the purposes of a wharf is an express power. *The right of the company to hold property exempt from the exercise of this power, cannot, it seems to us, be extended, by construction, to lands held by the company* FOR USES AND PURPOSES FOR WHICH IT IS NOT BY LAW AUTHORIZED TO CONDEMN PRIVATE PROPERTY."

In *Little Miami &c. R. R. Co.* v. *Dayton,* 23 Ohio St., 510, 518, the court said:

"Property appropriated to a particular public use is not thereby withdrawn from the liability to be taken for a different and inconsistent use, whenever, in the judgment of the

> legislature, the public exigency may require. The power of eminent domain is a prerogative of sovereignty. It is not exhausted by use, and can only be limited by the public exigency upon which it is founded. *Giesy* v. *Railroad Co.*, 4 Ohio St., 324. But where land is appropriated, PURSUANT TO LEGISLATIVE AUTHORITY, to an important public use, a subsequent grant can not be held to authorize the same land to be taken for a use wholly inconsistent with, and which, in the actual circumstances, must necessarily supersede the former use, unless such appear, by express words, or by necessary implication, to be the legislative intent. *Boston Water Power Co.* v. *B. & W. R. R. Co.*, 23 Pick., 360.

Railroad Co. v. *Village of Belle Centre*, 48 Ohio St., 273 (1891), was a suit by the railroad to enjoin the village from taking possession of certain real estate under a judgment of the Probate Court rendered in a proceeding in which the Village had prayed for the appropriation of the real estate for the purposes of public offices and a prison for the Village. It was contended that the Probate Court was without jurisdiction, and its judgment consequently void, *because the Village had no power to appropriate it for the reason that "the property was already devoted to a public use, viz., that of the railroad company, and could not be taken for another and different public use, under the general power possessed by the defendant to appropriate real property for such use."* The Court said (p. 295):

> "All property, however held, is necessarily subject to the legitimate exercise of the power. *It seems to be a well-established rule, however, that property already appropriated*

IN THE PROPER EXERCISE OF THE POWER OF EMINENT DOMAIN, *cannot be taken for another public use which will wholly defeat or supersede the former use, unless the power to make such second appropriation be given expressly or by necessary implication. Railroad Company* v. *Dayton, supra.*"

In *Northern Ohio Ry. Co.* v. *Commissioners of Hancock Co.*, 63 Ohio St., 32, 39, the court said:

> "It is the settled rule in this state that, while property already appropriated IN THE PROPER EXERCISE OF THE POWER OF EMINENT DOMAIN cannot be taken for another public use that will wholly defeat or supersede the former use, unless the power to make the second appropriation be granted expressly or by necessary implication, land held by a corporation, whether acquired by purchase or appropriation, may, subject to that limitation, be made subservient to other needed public uses. *Railroad Co.* v. *Belle Centre*, 48 Ohio St., 273."

Thus in each case in which the Supreme Court of Ohio has had occasion to advert to the rule invoked by the defendants it has carefully limited it to property which has been devoted to a public use *"in the proper exercise of the power of eminent domain"*; and in *Iron R. R. Co.* v. *Ironton, supra, it expressly refused to apply the rule to "lands held by the company* FOR USES AND PURPOSES FOR WHICH IT IS NOT BY LAW AUTHORIZED TO CONDEMN PRIVATE PROPERTY."

It consequently follows that, "under the settled rule of law which existed in the State at the time the State action relied upon as a contract was taken," the plaintiff's right to appropriate extended, if not to all property, at least to *all*

property not previously devoted to a public use "in the proper exercise of the power of eminent domain".

Was the devotion asserted in this case made "in the proper exercise" of that power?

The Realty Company, as we have seen, is nothing but a real estate company. It will not be pretended that it could have condemned land for any purpose, and as a matter of fact it did not even attempt to build the dam or power plants.

The Traction Company is what is known in Ohio as a "street and interurban railroad;" that is, it was organized to operate street railroads both *inside* and *outside* of municipalities. The powers of appropriation conferred upon such corporations (aside from provisions as to elevated roads, occupancy of turnpikes and plank roads, the right to make joint use of tracts, which, of course, are not material here) are as follows:

As to powers *inside* of municipalities, it is provided:

> "When it is deemed necessary by a majority of the directors of a domestic or foreign corporation owning or operating a street railway in a municipality to appropriate private property therein, in order to avoid dangerous or difficult curves or grades, or unsafe or unsubstantial grounds or foundations or to extend or shorten its railway line, or to provide land on which to *extend its power plant,* such corporation may appropriate so much private property as is necessary *for the extension of such power plant,* or the construction, operation and maintenance of the tracks, poles, supports, wires, cables and necessary appliances of such railway *other than power houses,* machine shops, stations or substations in the manner and subject to the provisions of law

for the appropriation of private property by corporations."

Ohio General Code, § 9115.

As to powers *outside* of municipalities it is provided:

"When necessary to enter upon and use private property *in the construction and operation of such roads*, such companies shall have *the same power of appropriation that steam railroad companies possess.*"

Idem, § 9119.

The power of appropriation conferred upon steam railroads (other than with respect to changes of grade and route and elevated roads) is as follows:

"A company or municipal corporation which owns or operates a railroad may enter upon any land for the purpose of examining and surveying its railroad line, and appropriate so much thereof as is deemed necessary *for its railroad*, including necessary *side-tracks, depots, work-shops, round-houses* and *water-stations, material for construction, except timber*, a *right of way over adjacent lands* sufficient to enable it to construct and repair its road and the right to conduct water by aqueducts and to make proper drains."

Idem, § 8759.

It is clear that these sections do not confer upon the Traction Company any power to appropriate the land here in question for the use to which it has been put. The land in question is situated *outside of a municipality*. As to it, therefore, the eminent domain powers of the Traction Company are *only such that "steam rail-*

road companies possess'' (Sec. 9119), and it is obvious that *steam* railroads have no power to appropriate for power-houses for the generation of *electric* current, whether that current be generated by means of steam or water-power. It is particularly significant, too, that as to the powers that may be exercised by street railroads *within municipalities* the legislature, while giving authority to appropriate land for an extension of an existing power plant, has *expressly denied the right to appropriate any land for a new power-plant* (See 9115 quoted above). It is furthermore significant that it was not until two years after the organization of the Traction Company that the legislature of Ohio, by enacting the statute under which the plaintiff was incorporated, first recognized the development of hydro-electric power as a public use and conferred the right of appropriation therefor; and by that statute the right was limited to *corporations organized for that express purpose.*

If further confirmation were needed for the assertion that the use upon which the defendants rely to defeat this case is not one for which the Traction Company could appropriate property, such confirmation is found in the fact that *the Traction Company did not even attempt to build the plant itself; the whole scheme was carried on in the name and under the cloak of The Northern Ohio Power Company.* And it is settled beyond controversy that that Company could not exercise the power of eminent domain.

Parkside Cemetery Case, supra, pp. 62-65.

It is thus clear to a demonstration that the defendants' use of the land, even though it be a public use, does not constitute a devotion of the

land to a public use *"in the proper exercise of the power of eminent domain"*; and, under the authorities cited, the land is hence subject to the plaintiff's right to appropriate it to its own use.

B.—The plaintiff's charter gives it a right to acquire the land in controversy even though it be legally devoted to a public use.

There are two reasons why the plaintiff has this right:

1.—It is well settled that the rule that property already legally devoted to a public use cannot be taken unless the authority to take it is given in express terms or by necessary implication, does not apply to property that is *not necessary to the proper exercise of the corporate franchises of the company which has made the first devotion.* In order to bring a particular parcel of land within the protection of the rule it must be *so employed in the exercise of the public franchise that the public service cannot reasonably be performed without it.* And the necessity for its use must be one that *arises out of or inheres in its situation,* and not one created by the company claiming the protection of the rule. Nor does the mere convenience of such company amount to such necessity.

Lewis, Eminent Domain, Sec. 418, 442;
Southern Pac. R. R. Co. v. *Southern Cal. R. R. Co.,* 111 Cal., 221;
Peoria P. & J. R. R. Co. v. *Peoria & S. R. R. Co.,* 66 Ill., 174;
Seattle, &c., Co. v. *Bellingham Bay, &c., Co.,* 29 Wash., 491; 92 Am. St. Rep., 907, 913;
North Coast Ry. v. *Northern Pac. Ry. Co.,* 48 Wash., 529, 534, 535;

North Carolina, &c. R. R. Co. v. *Carolina Central Ry. Co.*, 83 N. C., 489;
N. Y. Housatonic & No. N. R. Co. v. *Boston H. & E. R. R.*, 36 Conn., 196;
Scranton Gas & Water Co. v. *Coal & Iron Co.*, 192 Pa. St., 80, 94, and cases there cited;
Phila. & Camden Ferry Co. v. *Intercity R. R. Co.*, 73 N. J. Law, 86.

The land here in question is not necessary to the proper exercise of the corporate franchises of the Traction Company, because, although it be conceded that the Traction Company must have power, it is not necessary that it get it from this particular place. Whatever dependence it has upon the power plants it has erected on this land was voluntarily created by itself for its own private convenience, and this is precisely the thing which the cited authorities hold cannot be considered a "necessity" to the proper exercise of corporate franchises. The public functions of the Traction Company can be performed with equal satisfaction to the public whether it obtain its power from these power plants or from any others that may be located at any one or more of a hundred different places, whereas the public functions of the plaintiff cannot be performed at all except by a utilization of the waters of the Cuyahoga River.

It has been expressly ruled that a street railroad cannot condemn a site for a power house upon a stream for the very reason that the public functions of such a company do not require a particular location for such a plant, and "the generation of the power to propel cars is the *private* business of the company."

In Re Rhode Island Suburban Ry. Co., 22 R. I., 457.

The principles and reasoning of that decision have been approved, followed, and applied in many other cases.

Eldridge v. *Smith*, 34 Vt., 484;
In re N. Y., N. H. & H. R. R. Co. v. *Kip*, 46 N. Y., 546, 552;
Boston & Maine R. R. v. *City of Franklin* (N. H.), 84 Atl., 44.

And the doctrine was stated in Ohio at an early date in the classic opinion of RANNEY, *J.*, in the leading case of

Giesy v. *Cincinnati W. & Z. R. R. Co.*, 4 Ohio St., 308,

in which a *depot* was held to be a public use because it is essential to the operation of a railroad *and must necessarily be situated at a particular place.*

2.—We have thus far discussed the case upon the assumption, most favorable to the defendants, that the plaintiff possesses a mere general power of eminent domain such as would not enable it to appropriate any land legally devoted to a public use.

We now propose to show that if, as claimed by the defendants, the land here in controversy be devoted to a public use, the plaintiff's charter nevertheless gives it the right to acquire it.

As heretofore pointed out, all property of all kinds, even though legally devoted to a public use, is subject to the power of eminent domain.

Cincinnati v. *Louisville & Nashville R. R. Co.*, 223 U. S., 390;
Long Island Water Supply Co. v. *Brooklyn*, 166 U. S., 685;
Railroad Co. v. *Village of Belle Centre*, 48 Ohio St., 273.

The question which arises when one corporation attempts to appropriate property already devoted to a public use is not as to the power of the legislature to authorize the taking but as to whether or not it has in fact authorized it. And the settled rule is that such authority may be conferred either expressly or by *necessary implication;* and such implication may arise either from the language of the charter *or from an application of the charter to the subject-matter.* That is to say, if powers expressly granted cannot be exercised without the authority to take property already devoted to a public use, such authority is necessarily implied. Or, more specifically, if the plaintiff cannot accomplish its corporate purpose and right of building a hydro-electric plant upon the Cuyahoga River without appropriating property already devoted to a public use the right to make such appropriation is necessarily implied.

In *Hickok* v. *Hine,* 23 Ohio St., 523, a landowner upon a navigable river sought to enjoin the county commissioners from building a bridge over the river in such a way as to obstruct navigation. The defendants contended that with respect to this bridge they had succeeded to the rights of a plank-road company, and *the inquiry was whether that company had power to build such a bridge.* The court referred to the act incorporating the company and said (p. 530):

> "That the act conferred power to build a bridge across Grand River is not disputed. *Though not given in express terms, it is necessarily implied in the grant of power to construct a road from one point to another, between which points the river must be crossed.*"

It then proceeded:

"But does it confer power to build a bridge of a character and at a place that will obstruct the navigation of the river? Such a power is not expressly given; * * *. There is no apparent necessity for building the bridge at a place, or in a manner, that will obstruct the navigation of the river. On the contrary, it is quite apparent that it might be constructed where it would not have that effect; or that it might at least be constructed with a draw, in such a manner as to be consistent with the use of the river for purposes of navigation.

"Since, then, the act confers no express power to obstruct the navigation of the river, and it was *not necessary for the accomplishment of the purpose contemplated by the general power granted,* the obstruction of the river finds no warrant in the act. Nor can it be claimed under the general powers conferred by law upon the commissioners.

"Powers in derogation of the rights of individuals, or of the public, conferred in general terms upon corporations or public officers, must be construed with some degree of strictness. Where the legislature has power to require one public easement to yield to another more important, the intention to grant such power must appear by express words, *or by necessary implication.* Such implication can arise only when *requisite to the exercise of the power expressly granted,* and it can be extended no further than the necessity of the case requires. *Springfield* v. *Railroad,* 4 Cush., 63; *Fall River, etc.,* v. *Railroad,* 5 Allen, 221."

In the case at bar the place where the plaintiff's plant is to be built is expressly and specifically

fixed by its charter, and the right to put it there is "necessary for the accomplishment of the purpose contemplated by the general power granted."

In *State ex rel. Attorney General* v. *Railroad Co.*, 37 Ohio St., 157, 176, 177, it was said:

> "We do not question the power of one corporation authorized to appropriate land for a public use, to acquire the property of another or of the public, also devoted to the same or another public use, but such power must be conferred by express terms, *or by necessary implication.* Such implication does not arise *when the express powers conferred can by reasonable intendment be exercised without such appropriation. Matter of B. & A. R. R. Co.*, 53 N. Y., 574; *Inhabitants of Springfield* v. *Conn. R. R. Co.*, 4 Cush., 63; *Stevens* v. *Paterson & Newark R. R. Co.*, 5 Vroom, 532. * * *
>
> "We do not question the power of the legislature to authorize a change of public uses, but in the terms of the syllabus in *Hickok* v. *Hine*, 23 Ohio St., 523; 'where the legislature has power to require one public easement to yield to another more important, the intention to grant such power must appear by express words, *or necessary implication;* and such implication arises only when *requisite to the enjoyment of the powers expressly granted,* and can be extended no farther than such necessity requires."

In *Ravenna* v. *Pennsylvania Co.*, 45 Ohio St., 118, the question was as to the power of a municipal corporation to make an ordinance. After saying that the municipality did not possess the power unless it had been conferred by statute, the court said:

> "Except as to *incidental powers, such as are essential to the very life of the corpora-*

tion, the presumption is that the state has granted in clear and unmistakable terms all it has designed to grant at all. Doubtful claims to power are resolved against the corporation. Cooley on Constitutional Limitations, 233, 234; *Minturn* v. *Larue,* 23 Howard (U. S.), 435; *Bloom* v. *Xenia,* 32 Ohio St., 465."

In *Toledo Consol. St. Ry. Co.* v. *Toledo El. St. Ry. Co.,* 50 Ohio St., 603, 36 N. E., 312, the Electric Company, acting under a grant from the city council of the right to acquire, construct and operate a street railway, sought to condemn the right to use the tracks of the Consolidated Company. The appropriation was resisted upon the ground that the property was already devoted to a public use and the statute which attempted to give the power to appropriate was unconstitutional. One section of the statute (R. S., 3438) in general terms conferred upon city councils the power to grant to street railway companies the right to construct their railways therein, with a *proviso* that authority to occupy the tracks of existing street railways should not be granted "for more than one-eighth of the entire distance, between the termini of the route" of the company to which the grant was made. Another section of the statute (R. S., 3440) provided that where the council made such a grant the company to whom it was made "*may appropriate any property necessary therefor* where the owner fails to expressly waive his claim to damages by reason of the construction and operation of the railway." This section was amended in 1890 by the addition of a specific and express authority to appropriate the joint use of the tracks. This amendment was claimed to be unconstitutional. The court left this question undecided and *held that the general authority*

given by Section 3440 before the amendment was a sufficient grant of authority to sustain the condemnation proceedings.

The court said (pp. 614, 615):

> "The real question here presented is, whether the provisions of the original section authorize one street railway company to appropriate to its use the tracks of another company, subject to the restrictions contained in Section 3438 of the Revised Statutes."
>
> * * * * * * *
>
> "By the terms of the original Section 3440, the company 'to whom the grant is made *may appropriate any property necessary therefor*, when the owner fails to expressly waive his claim to damages by reason of the construction and operation of the railway.' The authority of the company to appropriate appears to be as comprehensive as the authority of the municipality to make the grant, and INCLUDES THE RIGHT TO APPROPRIATE ANY PROPERTY, OF WHATEVER NATURE, NECESSARY TO RENDER THE GRANT EFFECTIVE. Section 3438 was in force with Section 3440 before the passage of the amendatory act of 1890; and unless the right granted under the former section to one street railway company to use the existing tracks and structures of another company could be enforced by appropriation proceedings, the power to make the grant would be futile, for it could, in every instance, be defeated by the refusal of the owner to consent to such use, or come to an agreement concerning the damages; a result evidently not intended by the legislature. *The terms of the statute prior to the amendment are broad enough to authorize the appropriation sought by the defendant in error, and it is not apparent why their general purport should be restrained.* The context does not require it."
>
> * * * * * * *

"It is further claimed by the plaintiff in error that the appropriation was unwarranted because it practically defeated the public use to which the property appropriated was already devoted. If that was the effect of the appropriation, it is clear it could not be made, unless the power to make it was granted expressly, *or by necessary implication. Railroad Company* v. *Belle Center*, 48 Ohio St., 273. *But, as has been shown, the power to make the appropriation was so granted.* * * *

That decision is controlling here. The provision in that case was that the company "may appropriate any property necessary therefor," and this is certainly not broader than the provision of Section 10,128 which confers upon the plaintiff the right to appropriate any private property deemed necessary for its purpose. In that case it was held that the right included "the right to appropriate any property, of whatever nature, necessary to render the grant effective", even though it was devoted to a public use, and the same construction must be given to the plaintiff's charter in this case.

In *Housatonic &c. R. R. Co.* v. *Lee & H. R. R. Co.*, 118 Mass., 391, the court, after stating the rule that it is not to be presumed that the legislature intended to allow land devoted to one public use to be subjected to another unless the authority be given in express words *or by necessary implication*, said:

"And such implication can only be found in the language of the act, *or from the application of the act to the subject matter*, so that the railroad could not be laid, in whole or in part, by reasonable intendment on any other line."

This same principle of construction is applied in Ohio; for in *Shaver* v. *Starrett*, 4 Ohio St., 494, 499, it was said to be a "familiar maxim" that "a law is to be construed with reference to its subject-matter."

In *Providence &c. R. R. Co.* v. *Norwich &c. R. R. Co.*, 138 Mass., 277, it was said:

> "When it appears by statute, *or by the application of the statute to the subject matter*, that the contemplated road cannot reasonably be built without appropriating land already devoted to a public use, an implication arises that the legislature intended that such appropriation might be made."

In that case a statute of Massachusetts provided for the establishment of a union passenger station at Worcester for the joint use of all the railroads entering the city. The statute authorized the different companies to change and extend the location of their tracks so as to reach the new station, but it did not define the locations to be occupied. It was shown that it was not feasible for the Norwich and Worcester Railway Company to reach the new station without taking a part of the right of way of the Providence and Worcester Railway Company, and it was held that the act conferred by necessary implication the right to do so. Speaking of this case LEWIS says:

> "In this and in many similar cases, where the authority was given by special act, the location of the proposed railroad was more or less completely defined by the legislature. In such cases, if in carrying out the power so expressly given, it becomes reasonably necessary to take property already devoted to public use, there is a necessary implication

that the legislature so intended. The necessity for the taking is created directly by the legislature itself."

Lewis, Eminent Domain, § 420.

Lewis further says:

"It is manifest, however, that even a railroad company which is organized under a general law may show a reasonable necessity for taking part of the right of way of another road, as when it is located through a town in which another road has been previously built, and the topography or other conditions are such that the new road cannot reasonably be located so as to accommodate the public and accomplish the object in view without either encroaching on the right of way of another company, or incurring ruinous or greatly increased expense. The same necessity may arise in mountainous countries, or else the first company might preclude all others from reaching certain localities."

Lewis, Eminent Domain, § 420, p. 758.

Testing the plaintiff's rights "by the application of the statute to the subject matter," as authorized by the cases above cited, we find that the plaintiff has been granted the right to construct a hydro-electric plant upon the Cuyahoga River. This is the only purpose of the plaintiff's incorporation, the express purpose and sole object of the grant. The plant cannot be built in any other place; and if the land here in controversy be devoted to a public use, the plant cannot be built—the grant cannot be made effective or carried out even in part—unless the plaintiff have the right to appropriate property already devoted to a public use. The right is thus conferred *by*

necessary implication, because it is "requisite to the enjoyment of the powers expressly granted" (37 Ohio St., 157, 177)—because "the express powers conferred can (not) by reasonable intendment be exercised without such appropriation" (*id.*, p. 176)—because the right is "essential to the very life of the corporation" (45 Ohio St., 118, 121).

We are, of course, aware that it has been many times asserted that the State cannot authorize the appropriation of property already devoted to a public use when the appropriator is merely to continue to employ it for the same use in the same way—that "where there is no change in the use there cannot be a change in ownership under the law of eminent domain."

Cary Library v. *Bliss,* 151 Mass., 364, 379;

Suburban R. R. Co. v. *Metropolitan W. S. El. R. R. Co.,* 193 Ill., 217, 223;

West River Bridge Co. v. *Dix,* 6 How., 507, 537;

Lewis, Eminent Domain, Sec. 440, and other cases cited in Notes 83, 84, 85.

We assume this to be the law; and in asserting that the plaintiff may appropriate the land in question, although it were devoted to a public use, we do not now counter to that principle. On the contrary, the plaintiff's use and the defendants' use are different in every important respect.

The Act of 1904, under which the plaintiff was incorporated, provides for the utilization of the rivers and streams of Ohio in an important public service. It is, in its purpose and effect, a part of the nation-wide movement for the conservation and development of the natural resources in an

enduring and comprehensive manner—a movement which this court has materially assisted by a broad interpretation of State and Federal statutes having this object in view.

The plaintiff, after extensive investigations carried on by eminent engineers, has formulated a plan for the development of the Cuyahoga River as a whole. It proposes, by means of storage reservoirs, canals and conduits, to regulate the now variable and uncertain flow of the stream at the uniform rate of 300 cubic feet per second. By means of this regulated flow and the power stations to be erected by it, the plaintiff will be enabled to develop and furnish to the public 20,827 electric horsepower for continuous service ten hours daily, or a net delivery of approximately 55,000,000 kilowatt hours per year (Rec., p. 240). The territory to be served embraces a population of over 1,000,000 persons; and by reason of the great demand for light, heat and power, there is a ready market and need for the plaintiff's entire output. And the incidental benefit which this regulation of the flow of the river confers upon the public by doing away with flood damages at certain seasons and periods of drought at others is, of itself, a public use of vast importance.

The defendants' use is the very antithesis of this conservation and regulation. The amount of power they develop by their hydro-electric plant is but 2,700 horsepower *and this for only seven months in the year.* Their plant, indeed is but a "booster" for their steam plant, and *instead of being a development of the river, it is a destruction of it.* In short, the defendants' use is, in reality, nothing more than the old familiar millpond—a water power on one's own land for one's own individual use—and the real claim of the

defendants in this case is that in order that they may continue this use of a mile and a half of the river the people of Ohio must forever be deprived of the advantages of the millions of horsepower that can be produced—all development of sixty-eight miles of the river must be abandoned for all time and nearly nine-tenths of its capacity for public service must go permanently to waste.

We have no desire to belittle the public service which the defendant Traction Company is rendering along other lines in other fields. Its service as a railroad is important. But that service has been and can be performed without destroying the whole Cuyahoga River; and the only proposition we urge here is that the Traction Company's own private convenience must yield to the public welfare.

The Legislature has determined upon the development of the rivers and streams of the State and organized the plaintiff as its agent for this purpose; and its purpose as well as the grant it has made to accomplish that purpose should be given effect.

CONCLUSION.

The case may be accurately summed up in a sentence written by Mr. Justice Holmes in *Denver & Rio Grande R. R.* v. *Arizona & Colorado R. R.*, 233 U. S., 601, 604: "The defendant has gone ahead since the suit was begun, but of course has acquired no new rights by doing so."

The judgment should be reversed with costs and with instructions to the State court to empanel a

jury and assess the defendants' compensation without reference to the structures erected upon the land subsequent to the commencement of this proceeding.

Respectfully submitted,

WILLIAM Z. DAVIS,
JOHN L. WELLS,
CARROLL G. WALTER,

Counsel for Plaintiff-in-Error.

February, 1917.

Supreme Court, U. S.
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Supreme Court of the United States,

OCTOBER TERM, 1916.

No. 342.

THE CUYAHOGA RIVER POWER COMPANY,
Plaintiff-in-Error,

against

THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION AND LIGHT COMPANY,
Defendants-in-Error.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

REPLY BRIEF FOR PLAINTIFF-IN-ERROR.

WILLIAM Z. DAVIS, Columbus, Ohio,
JOHN L. WELLS
CARROLL G. WALTER } New York,
Counsel for Plaintiff-in-Error.

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Supreme Court of the United States,

OCTOBER TERM—1916.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff-in-Error, against THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION AND LIGHT COMPANY, Defendants-in-Error.	No. 342.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

REPLY BRIEF FOR PLAINTIFF-IN-ERROR.

Chronological Statement.

The defendants introduce a chronological statement of facts, which we will repeat with our comments:

> *"November 24, 1897, The Akron, Bedford & Cleveland Railroad Company secured a report on the water power at Cuyahoga Falls, where the property which the plaintiff is endeavoring to condemn, is located."*

But no action was taken on that report, or on any report, and nothing was done which even suggested devotion to a public use, until the land was deeded by the Northern Realty Company to the Northern Ohio Power Company, January 31st, 1911, two and a half years after the plaintiff obtained its charter and adopted its appropriation resolution of June 4th, 1908.

> *"December 14, 1897, The Akron, Bedford & Cleveland Railroad Company purchased this property and took title in the name of Henry A. Everett. This property was purchased for the purpose of water power development."*

But this Railroad Company had no right to purchase for water power in 1897, because such purchase was foreign to its corporate purpose. Nor did it have the power to purchase and hold land for purpose of development (*Case vs. Kelly*, 133 U. S., 21). What appears in the record is that the Railroad Company furnished money for this purchase, but the use of the money was unauthorized, and the purchase was dishonest, for it was taken in the name of Everett to defeat the lien of the bondholders (Record, p. 61).

The purchase could not have been for the development of water power in the sense in which the defendants now use that term because the statute authorizing such developments was not passed until 1904—seven years after the alleged purchase of the Akron, Bedford & Cleveland Railroad Company.

Furthermore, the witness Moore testified that the Realty Company was formed for handling property that was not in daily operation in connection with the Traction Company (Record, p. 73), and this was one of the properties named.

*"May 26, 1899, * * * Nov. 12, 1902, * * * Dec. 29, 1902."*

These are mere mergers and consolidations of street railroad companies, and could not affect property that was being held by Everett as Trustee.

"October 8, 1906, Resolution of the Board of Directors of the Northern Ohio Traction & Light Company, looking to the development of the property. Work was done from time to time in the way of reports of engineers."

But there was nothing done which would constitute a devotion to a public use. The work was all nebulous, the property was not even surveyed, there was no adoption of a location or setting apart of the property for a public use. On the contrary, in 1907 the Traction Company was negotiating with Willis Bacon to sell the property to a corporation which Bacon was to form, and from which the Traction Company was to receive power and light (Record, pp. 227-230).

"1897 to 1910. Various taxes and other payments made from time to time by the Akron, Bedford & Cleveland Railroad Co. and the Northern Ohio Traction Company on account of this property."

Such payments prove nothing as to devotion to public use. We may even construe them charitably as an honest payment, but every man may own property and he may pay taxes and this is the first time that it has ever been suggested that the payment of taxes or the ownership of property *ipso facto* devotes the property to a public use.

"1908. Plaintiff was organized, and in December adopted the Von Schon plan of development."

And, plaintiff adopted a specific location upon this property on June 4, 1908. It gave notice to the defendants by the service of summons in the former condemnation case commenced in June 1908 (Rec. pp. 128-140). This location has been adjudged specific by the decision of the highest Court of the State.

All steps thereafter taken by the defendants were subsequent in time, and give the defendants no rights as against the plaintiff.

"February 25, 1910. Resolution of the Board of Directors of the Northern Ohio Traction and Light Co. to purchase 57 additional acres of land and to construct a new power plant on this property."

But this is the first indication of any intention on the part of the defendants to make any utilization of this land, and when read in connection with the testimony concerning the Northern Ohio Power Company, the resolution is shown to mean that the Traction Company will construct the new power plant under the Charter of a dummy, *and for the uses of a dummy.* Prior to this time, the property had been owned by individuals or private corporations, and had been used for "a little dancing and roller skating."

"December, 1910. Active work commenced by the Northern Ohio Traction & Light Company in the construction of its plant on this property."

No part of this work was done upon the property described in this petition. It was only for the steam plant. Moreover, the work was done for the dummy to be created later, and to whom the property was deeded January 31, 1911.

Furthermore, all this work was done with full notice that this property had already been devoted to the plaintiff's public use under a valid statute.

> *"December 20, 1910. Deed from Henry Everett to Northern Realty Company."*

This deed was made while this suit was pending, which was notice to the Northern Realty Company and its grantees that plaintiff had devoted this property to a public use. And the grantee took subject to the proceeding.

> *"January 31, 1911. Deed from Northern Realty Company to Northern Power Company."*

But, the grantor and grantee took subject to the proceedings of plaintiff already begun.

> *"February 24, 1914. Deed from Northern Power Company to Northern Ohio Traction & Light Company."*

But the grantor and grantee both took subject to the proceedings of plaintiff. The entry by these parties for the construction of dams, power houses, etc., is a confiscation of plaintiff's property rights and an impairment of its charter.

Reply to Defendant's Point II.

AS TO FEDERAL QUESTIONS BEING INVOLVED.

1. The defendants make the contention that this case does not come within the *third* clause of §237 of the Judicial Code (which gives jurisdiction to review decisions against a title, right, privilege or immunity specially set up and claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States) because the plaintiff's right to condemn "is based solely upon the Constitution and laws of the State of Ohio and its charter secured under those laws" and is thus a *"State right"* and not a Federal right (Brief, pp. 22, 23, 6).

This contention is wholly destroyed by the obvious fact, clearly admitted by the defendants in another portion of the brief, that although the right to condemn has its source in a State grant,

> "It is none the less entitled to protection under both the contract impairment clause and the due process clause of the Federal Constitution" (Brief, p. 6).

And

> "Plaintiff's claim that this right is a contract right and that it has been impaired raises the Federal question, and plaintiff's further claim that this right is a property right and that it has been deprived of this property without due process raises a Federal question" (Brief, p. 8).

Moreover, the contention that this Court has jurisdiction only where the right asserted is origi-

nally derived from and has its source in a *Federal* enactment is utterly at variance with the decided cases. Under that theory the *Dartmouth College case* could not have come to this Court. Neither could *Piqua Branch State Bank vs. Knoop,* 16 How., 369, because in that case, as in this, the right relied upon was one conferred by Ohio statutes. Neither could *Ettor vs. Tacoma,* 228 U. S., 148, have been brought here, because the right asserted in that case was created solely by a State statute. Neither could this Court have taken jurisdiction of *Detroit United Railway vs. Michigan,* 242 U. S., 238, because the contract asserted in that case arose solely from a State grant. Illustrations might be multiplied indefinitely, but these are sufficient to show the absurdity of the point.

2. The defendants further contend that this case does not come within the *second* clause of §237 of the Judicial Code (which gives jurisdiction to review decisions in favor of the validity of a statute of or authority exercised under any State, the validity of which is drawn in question on the ground of their being repugnant to the Constitution, treaties or laws of the United States) because, as they say, "there is nothing in the record to show that the State Court sustained the validity of the defendants' devotion of property to a public use" (Brief, pp. 23, 24).

This, of course, is but another way of saying that jurisdiction does not exist because the State Court may have rested its judgment upon a finding that the plaintiff had not established inability to agree or the necessity for the appropriation—a contention which we will discuss in the next point. If the State Court did not dispose of the case upon those

grounds, which it could not do on this record, it must have sustained the validity of the defendants' alleged devotion of the property to a public use because that is the only other ground upon which a judgment adverse to the plaintiff's right to acquire the land could conceivably rest.

> "It has never been required that a Federal right must be denied in terms, but it has been uniformly held that it is sufficient if the State court necessarily denied it in the judgment rendered."
>
> *St. Louis &c. Ry. Co. vs. Starbird,* per Mr. Justice DAY, decided April 30, 1917, not yet reported.

3. The defendants attempt to dispose of Point VI of our original brief (wherein it is set up that the Ohio Public Service Commission Act of June 30, 1911, is a subsequent law to which the State Court gave effect) as follows:

> "We did not mention this Ohio Commission Act for the reason that there is nothing whatever in the record to show any connection between it and defendants' devotion of the land to a public use, and on that account we did not consider that the point required an answer" (Brief, p. 24).

Of course the *"record"* does not show the statute under which the defendants acted. It is neither necessary, customary, nor proper to put State statutes in evidence in proceedings pending in State Courts. The State Court was obliged to take judicial notice of the statute and this Court, on writ of error, is obliged to do the same thing. The statute itself (quoted at pages 32 to 40 of the ap-

pendix to our brief) clearly shows that both the Traction Company and the so-called Northern Ohio Power Company were subject to its provisions, and that the right of each to purchase, sell, or lease the stock, property, plant, or business of the other, as well as the right of each to contract with the other with reference to the operation of their plants in connection with each other, was fixed, governed and controlled by the statute; and in determining the effect of the various purchases and sales between these companies shown in the record, the State Court was necessarily governed by this statute, and in giving effect to these purchases and sales it necessarily gave effect to the statute.

See *St. Louis, &c., Ry. Co. vs. Starbird*, per Mr. Justice DAY, decided April 30, 1917, not yet reported.

4. The defendants' attempt to dispose of Point V of our original brief (wherein it is set up that their alleged devotion of the land to a public use was a subsequent exertion of legislative power which impairs the obligation of the plaintiff's contract) by the bare assertion that none of the cases cited by us "sustain this position" (Brief, p. 24).

No attempt is made to explain why the cases are not in point. If there be a flaw in our argument, surely the defendants could have pointed it out.

Reply to Defendants' Points I, III and IV.

AS TO WHETHER THE FEDERAL QUESTIONS CONTROL THE DECISION AND WHETHER INABILITY TO AGREE NECESSITY FOR THE APPROPRIATION WERE SHOWN.

The defendants are forced to concede that in a case of this kind

> "this court will examine the record to see whether the non-Federal question is sufficient of itself to sustain the judgment of the State court without reference to the Federal question *and is a good and valid defense*" (Brief, p. 14. See, also, p. 21).

They "agree that this court must determine this issue" (Brief, p. 14), that even an independent non-Federal question "must have some support in the evidence" (p. 21); and that there must be "evidence to sustain the judgment" (p. 14).

They attempt to hedge about these concessions by the limitation that

> "This court will not *analyze and consider conflicting testimony* on an issue of fact which is fairly presented by the record" (Brief, p. 14);

and repeatedly throughout their discussion of the questions of inability to agree and necessity for the appropriation they speak of the absence of any right or duty of this court to determine "conflicting evidence" or "examine conflicting testimony" (Brief, pp. 18, 20, 21).

But even if this limitation be sound in law, it is wholly inapplicable here; for THERE IS NO CONFLICTING TESTIMONY OR CONFLICTING EVIDENCE IN THIS CASE. We do not ask the court to resolve a *conflict of evidence*, but only to examine *uncontradicted and undisputed evidence* in order to determine whether there is any basis for an adverse finding by the State court and "in order to deter-

mine what facts might reasonably be found therefrom and which would furnish a basis for the asserted Federal right."*

Another distinction attempted to be drawn by the defendants is that the rule that this court will examine the evidence in order to determine whether a finding of the State Court is supported by evidence applies only where the court is deciding a Federal question and has no application where the court is determining whether there is a valid non-Federal ground upon which the judgment can validly rest. Thus, at pages 20 and 21 of their brief they refer to some of the cases cited at pages 37 to 43 of the brief submitted by us in opposition to the motion to dismiss and say of them

> "In each one of these cases the first question considered by this court was whether a Federal question was presented. *In no one of them was it suggested that, in addition to an alleged Federal question, a non-Federal question was presented.* In each case this court, having decided that a Federal question was presented, proceeded to consider to what extent it would examine the facts. * * * These authorities have no bearing upon the issue presented in this branch of this case. They do not sustain plaintiff's apparent contention that even upon the assumption that separate and distinct non-Federal questions are presented, this court will examine conflicting testimony *in order to reach its own*

*Mr. Justice PITNEY in *Carlson vs. Curtis*, 234 U. S. 103, 106.

conclusion on the question whether a decision on any such non-Federal question in favor of a successful party in the State Court was justified."

As already stated, there is no conflicting testimony in this case; and apart from this it is very clear that the above quotation from the defendants' brief contains a very erroneous statement of what the cases hold. In one of them (*Creswill vs. Knights of Pythias,* 225 U. S. 246) it was very distinctly suggested that a non-Federal question was presented and there was actually a *dissent* in this court upon the ground that the State court's decision upon the non-Federal question prevented a review of the judgment. Despite this fact this court (as admitted by the defendants themselves on page 12 of their brief) examined the non-Federal question (laches) and in the language of the defendants, "reversed the judgment *as it found no evidence to sustain this defense*" (Brief, p. 12). In another of the cases referred to (*Southern Pacific Co. vs. Schuyler,* 227 U. S 601) a non-Federal question was presented and this court expressly stated that the non-Federal ground would have required a dismissal of the writ of error but for the fact that they were called upon to examine the evidence (p. 611). As a result of this examination of the evidence the court took jurisdiction and would have reversed the judgment had it not been that the *merits* were in favor of the defendants. In still another of the cases referred to (*Bowe vs. Scott,* 233 U. S. 658) it was distinctly set up that the judgment rested upon a non-Federal ground and this contention was made the basis of a motion to dismiss. In yet another of the cases cited

by us but omitted from the defendants' brief (*Cornell Steamboat Co. vs. Phoenix Construction Co.*, 233 U. S. 593) a non-Federal question was presented and made the ground of a motion to dismiss, yet the court took jurisdiction and examined a question of negligence. These authorities squarely hit the case at bar.

It thus comes about that the net result of the elaborate discussion in Points I, III and IV of the defendants' brief (which, indeed, is but a reargument of the propositions urged in their motion to dismiss) is a concession by the defendants that, whether the questions of inability to agree and necessity for the appropriation be regarded as so interwoven with the Federal question as not to constitute an independent matter or whether they be regarded as purely local questions separate and distinct from the Federal question, *this court must determine whether, upon the evidence in the record, inability to agree and necessity for the appropriation have been shown.*

These questions are adverted to at pages 14 and 25 of our original brief and are more fully discussed at pages 46 to 55 of the brief filed in opposition to the motion to dismiss. We respectfully refer the court to those portions of the briefs and will here confine ourselves to an answer to the statements now made by the defendants' upon these points.

Before taking up those subjects, however, we call attention to a statement in the defendants' brief which clearly shows that they are *not* State questions because they are so interwoven with the Federal question as not to be an independent matter sufficient to sustain the judgment without any

decision upon the Federal question. At page 16 of their brief the defendants refer to the motion which was made at the close of the trial to dismiss the petition "for the reason that there is no evidence proving that there was any attempt or failure to agree * * * and that the plaintiff has no right to appropriate the property described in the petition." And of this motion the defendants say:

> "It is *not clear* whether counsel for defendants meant by the last part of his motion that for the reason mentioned, to wit, failure to prove any attempt or failure to agree, plaintiff 'has no right to appropriate the property,' or whether by the latter part of his motion counsel meant that *under all of the evidence covering the several points of defense* 'plaintiff has no right to appropriate the property.' It may be that this motion to dismiss should be construed to cover *not only the defense that plaintiff had failed to prove inability to agree, but also had failed to prove necessity for the appropriation, and also that plaintiff had no right to appropriate because defendant had already appropriated the property to a public use.*"

The very ambiguity here suggested by the defendants themselves and their claim that the motion to dismiss for the reason that the plaintiff had "no right to appropriate" included the questions of inability to agree and necessity for the appropriation as well as the question of the effect of the defendants' alleged devotion of the property to a public use, clearly shows that even in their own minds they do not separate the so-called non-Fed-

eral questions from the Federal question, but, on the contrary, treat the one ultimate question as to the right of the plaintiff to acquire the land as involving and including *all the questions in the case* and recognize that the questions as to inability to agree and necessity are merely subsidiary—mere premises from which a conclusion as to the existence of the ultimate Federal right here asserted is to be reached.

Inability to Agree.

On this point the defendants say:

> "The record shows very clearly that the plaintiff was advised of the fact that the property was *owned* by The Northern Ohio Traction and Light Company and yet, with this knowledge, commenced to negotiate with The Northern Realty Company for the purchase of this property on January 16, 1911." (Brief, p. 14.)

Reference is then made to the two written offers addressed to the Realty Company which are mentioned on page 47 of our brief in opposition to the motion to dismiss. It is then stated that "there was some discussion between the representatives of the plaintiff and the representatives of The Northern Realty Company between January 16th and 20th, 1911, the principal conference being held on January 20th, the day on which this suit was instituted," and that Charles Currie, Vice-President and General Manager of the Traction Company, "took some part in this discussion." Reference is then made to the question put to Mr. Bacon as to whether he was talking to Currie be-

cause he represented the Traction Company, to which question the defendants state that he answered "No.' The complete answer is: "No, because he represented he had the matter in hand for selling the property, him and Mr. Davis." Comment is then made upon the alleged shortness of time. The defendants further intimate that there was some obligation on the plaintiff to cross-examine Currie with reference to the conference he had with Mr. Bacon, although Currie was called as a witness for the defendant and the subject was not gone into on his direct-examination. From all this the conclusion is drawn:

> "In this condition of the evidence a decision by the State court that plaintiff had failed to establish inability to agree would be fully justified" (Brief, p. 16).

And that:

> "It is further clear that the record shows an attempt by plaintiff to prove inability to agree and *an attempt by defendants to show that no sufficient effort had been made by plaintiff in this respect to meet the requirements of the statute.* This court will not analyze and construe the evidence in a case of this kind. This court will do no more than determine that this independent non-Federal question is broad enough to justify the decision of the State court and is a good and valid defense, and that the trial judge would have been justified, under the evidence presented, to sustain defendants' contention on this point" (Brief, pp. 16, 17).

The defense could not be "good and valid" unless there be evidence to sustain it. In what way did the defendants attempt to show that no sufficient effort had been made by the plaintiff? Where is the evidence that would justify a finding that inability to agree was not shown? The defendants do not refer to any and there is not a line nor a word nor a syllable of such evidence in the record. The only "attempt by defendants to show that no sufficient effort had been made" was the *bare assertion of counsel;* and even now counsel do not refer to a single page of the record where this Court will find any evidence which by any stretch of the imagination could be conceived as sufficient to justify the finding of failure to prove inability to agree which they seek to show the State Court may have made. There is no conflicting evidence for the Court to analyze. The testimony of Bacon and Palmer is unimpeached, uncontradicted, undisputed. If Currie had gone on the stand and denied that he had these conferences with Bacon or denied that he had said there was "nothing doing" or denied that he had referred Bacon to Christy, then a conflict of evidence would have been presented. But Currie did nothing of the kind. The subject was not gone into on his direct-examination, and of course there was no occasion for the plaintiff to question him about it on cross. It would have been improper to do so.

Neither could the State Court have found that there was "not time enough" to have the question of selling the property "presented to and considered by" the boards of directors of the Realty Company and Traction Company as suggested on pages 15 and 23 of the defendants' brief. This is not a case

in which a proceeding has been commenced on the theory that the refusal of the landowner to give an answer one way or another establishes inability to agree. Both Christy and Currie announced clearly and emphatically that there was "nothing doing," that "they would not part with the property at any price," that they "would not entertain any proposition for the purchase of it," and that "the property was not for sale" (Rec., pp. 46, 54). They did not want time to consider the matter. They gave a positive answer on the spot. And there is not the slightest suggestion anywhere in the record that they were not fully authorized to give a final answer for both corporations.

As stated in our brief on the motion to dismiss the contention that plaintiff failed to show inability to agree is nothing but a *quibble* over the question of "ownership" as between the Rea'ty Company and the Traction Company; and even now the defendants squarely base their contention upon the proposition that the record shows that the plaintiff "was advised of the fact that the property was owned by The Northern Ohio Traction and Light Company, and yet, with this knowledge, commenced to negotiate with the Northern Realty Company."

The plaintiff was *not* advised that the Traction Company was the owner (See Record, bottom of page 48 and top of page 49), and such is not the fact. Where is the evidence of the Traction Company's ownership? The defendants refer to none. On the contrary, their own chronological statement shows that on December 20, 1910, the land was conveyed by Everett to the Realty Company by an absolute deed; that this suit was commenced on Janu-

ary 20, 1911; that the Realty Company conveyed the land to the North Ohio Power Company on January 31, 1911; and that it was not until February 24, 1914, that the Northern Ohio Power Company conveyed it to the Traction Company, *which conveyance was excluded from evidence by the Trial Court* (Record, p. 151).

And if, as claimed by the Traction Company, the Realty Company was *its trustee,* then the negotiations had with the Realty Company were amply sufficient by virtue of the express provisions of §11039 of the Ohio General Code quoted at page 52 of our brief in opposition to the motion to dismiss. Even if the State Court found everything that the Traction Company claimed, it was bound by this statute to hold that the negotiations with the trustee (Realty Company) were sufficient. This Court cannot reach the conclusion that it has no jurisdiction by assuming that the State Court deliberately violated a State statute. *Nor can this Court hold, on the merits, that inability to agree was not shown, because this statute is clear and controlling.* It expressly authorizes negotiations with the owner *or his trustee.*

Necessity for the appropriation.

The defendants' argument upon this subject is made up of such assertions as these:

> "Under plaintiff's plan of development, defendants' property is not needed" (Brief, p. 17).
>
> *"In this condition of the evidence* it is perfectly clear that the decision of the trial judge to the effect that plaintiff has failed to establish necessity to appropriate would be fully

justified. We cannot know whether the court based its judgment on this proposition but, in view of the fact that *the evidence* would have justified the judgment on that basis, this court will not take jurisdiction on any theory that this independent non-Federal question was not a valid and good defense and sufficient to sustain the judgment" (Brief, p. 17).

"* * * There is nothing in the record to justify a description which would include land one hundred feet wide on each side of the river. Why not make it two hundred feet, or only fifty feet? There is nothing to show any necessity for limiting the tract to one hundred feet on each side of the channel, nor in fact for extending the tract to that width. *The evidence* shows that the description was arbitrary and without any foundation of necessity" (Brief, p. 28).

Where is the evidence about which the defendants talk? They do not refer to any *evidence* at all. They simply make assertions.

The truth of the matter is that the land in question lies within the limits of the plaintiff's right of way as fixed in its articles of incorporation (see pages 9 and 25 of our original brief) and it is little short of absurd to talk about there being no necessity for the plaintiff's having the land within those limits. The land constitutes the bed and banks of the river and it is beyond comprehension how the plant could be constructed without it. Certainly the plaintiff would not indulge in prolonged and expensive litigation in order to establish its right to pay "just compensation" for something it does not need.

Moreover, the propriety and necessity for the appropriation are questions committed by the legislature to the discretion of the agency in which the power of eminent domain is vested—in this instance the plaintiff.

Giesy vs. Cincinnati, W. & Z. R. R. Co., 4 Ohio St., 308;

Kramer vs. Cleveland & Pittsburg R. R. Co., 5 Ohio St., 140, 146, where it is said that the exercise of the power of eminent domain "can only be restrained by the judiciary when its limits have been exceeded or its authority has been abused or perverted";

Bowersox vs. Watson, 20 Ohio St., 496. 507;

Cincinnati vs. Louisville & Nashville R. R. Co., 223 U. S., 390, where this court in a case involving the power of eminent domain in Ohio said that when the use is public "the propriety or expediency of the appropriation cannot be called in question by any other authority."

The statute requiring the corporation to prove the necessity (§11046) does not substitute the opinion of the Court for the opinion of the condemning party upon that question or give the Court any power to overrule the corporation's discretion in determining the question of necessity where no abuse of power is shown. In short, the question of necessity is determined primarily by the condemning party and *the only power of the Court is to prevent an abuse of power by the corporation.*

Wheeling & Lake Erie R. R. Co. vs. Toledo Ry. & Ter. Co., 72 Ohio. St., 368, 384;
Bowersox vs. Watson, 20 Ohio St., 496, 507.

It is settled, too, that the statute means only a *reasonable* and *not* an *absolute* necessity.

Reusch vs. Northern Ohio Traction & Light Co., 19 Ohio C. C. (N. S.), 1, 8.

In the present case the necessity for the appropriation of the land here in question was determined in the first instance by the plaintiff in its resolution of June 4, 1908 (Record, pp. 35, 36). Upon the trial, one witness testified upon this subject as follows:

"Q. From your knowledge and familiarity with the plant and project of The Cuyahoga River Power Company are you able to state whether or not in the event that project is constructed and development made, the property described in the petition here is necessary to carry out the project? A. I am able to state so, yes, sir.

"Q. And is it necessary? A. Absolutely necessary. It could not be constructed without" (Record, p. 52).

Another witness testified on cross-examination by the defendants' counsel:

"Q. If a dam were built within the limits of the land described in the petition in this case and backed the water to the Village of Cuyahoga Falls or to a point within the limits of the Village of Cuyahoga Falls, and that dam

was 60 feet high and a hydro electric plant had been built a distance of 2,700 feet below it having a capacity of about 3,000 horse power, and a steam plant had been built within the limits of the land described in the petition with a capacity of 30,000 horse power or more, both using the water contained in the reservoir made by that dam, *would you say that the development proposed by the Cuyahoga River Power Company would be destructive of that use?* A. Yes" (Record, p. 241).

If the development proposed by the plaintiff would destroy the use of the land made by the defendants the necessity for appropriating the land necessarily follows.

Still a third witness testified with reference to the construction of the project of the plaintiff:

> "Q. Would it or would it not necessitate the taking of that property (*i. e.* the defendants' property)? A. It would."
> (Record, p. 246.)

All this testimony went in without objection and it was all given by witnesses whose qualifications to speak upon the subject were unquestioned. Nor is there a syllable in the record to contradict it. Nobody suggested in the State Court that the decision of the plaintiff to take a strip of 100 feet rather than a strip of 50 or of 200 feet was arbitrary; and there being no evidence whatever to impeach or contradict the judgment and opinion of the three expert engineers who testified for the plaintiff, their testimony cannot be overcome by the mere assertion of defendants' present counsel in their brief in this court. If there were any-

thing arbitrary about the plaintiff's determination to take a strip of this width it surely could have been brought out by cross-examination of the plaintiff's experts or by any one of several of the witnesses actually called by the defendants upon the trial. *The defendants made no attempt whatever either to contradict the evidence given by the plaintiff's witnesses or impugn the soundness of their views upon the question of necessity, which, after all, is largely an engineering question.* In short, as pointed out on pages 53 and 54 of our brief in opposition to motion to dismiss in this court, this question of necessity was not raised in the State court or in any way saved or preserved.

In addition to this, the defendants explicity admit in both of their briefs in this court that the construction of the plaintiff's improvement "will injure defendants' property because it will deprive defendants of the ordinary flow of the river" (Brief, p. 17); and that it "would cause damage to defendants for it would divert the ordinary flow of the river so that defendants would be deprived of their riparian rights" (Brief on Motion to Dismiss, p. 23. See also p. 54 of our Brief on Motion to Dismiss and quotations there set forth).

And the Supreme Court of Ohio has decided that riparian rights "constitute a part of the owner's estate in the land, and materially enter into its actual value; and that *any injurious invasion, or impairment of those rights, amounts to a taking of the owner's property.*"

Mansfield vs. Balliett, 65 Ohio St. 451, 470, 471.

In that case a city was held liable for damages because it had polluted a natural watercourse without acquiring the riparian rights of the owners along the stream by legal appropriation proceedings. Obviously, therefore, a construction of the plaintiff's plant would constitute a *taking* of the defendants' property, and because of this fact it is absolutely necessary under the decisions of Ohio for the plaintiff to appropriate the property in order to be able to go ahead with its undertaking.

Apparently the defendants' idea (put forward now in order to defeat this case but to be quickly abandoned when the time comes for assessing compensation) is that only a *flooding* of their land would constitute a taking and that as the plaintiff may only deprive the land of "the ordinary flow of the stream" no necessity for the appropriation exists (See their brief, pp. 17, 27). In answer to this it is sufficient to say that if, as held in *Mansfield vs. Balliett, supra,* a mere *pollution* makes an appropriation necessary, *a fortiori* or deprivation of the flow makes it necessary. But in addition to this, the evidence shows that no plant can be constructed that will not lose some water, and in times of flood it will be necessary to let the flood waters down over the land in question (See Rec., pp. 240-242). In short, the plaintiff must control the flow of the stream; and while at some times the land in question will be *deprived* of the ordinary flow at other times it will be subject to *overflow*. There is "no ground for the distinction attempted between the taking of rights below the contemplated dam, such as these are, and those above."

Mt. Vernon Cotton Co. vs. Alabama Power Co., 240 U. S., 30, 33.

The riparian right thus necessary to be destroyed (*i. e.*, taken) by the plaintiff "is not a mere easement or appurtenance, but exists by the law of nature as *an inseparable part of the land.*"

> *United States vs. Cress,* per Mr. Justice PITNEY, decided March 12, 1917 (not yet reported) paragraph (4) of opinion;
> *Mansfield vs. Balliett, supra.*

And as the plaintiff's plan "takes away the use and value" of the land it results that its plan "must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee."

> *United States vs. Lynah,* 188 U. S., 445, 470, quoted in
> *United States vs. Cress, supra,*

It may be mentioned in passing, too, that it is settled in Ohio that the statute authorizes the taking of a fee.

> *Pittsburgh & Western Ry. Co. vs. Garlick,* 20 Ohio Cir. Ct. 561, affirmed 66 Ohio St. 688.

At page 27 of the defendants' brief there is a suggestion that the statute does not authorize a "diversion" of water. But the statute expressly provides for the building of *dams* "to raise and maintain a head of water," the "constructing and maintaining" of *"canals, locks, and race-ways* to regulate and *carry* such head of water to any plant or power house where electricity is to be generated," the entry upon land for the purpose of ex-

amining and surveying "for a reservoir, dams, canals, race-ways, plant or power-house" and the appropriation of "so much thereof as is deemed necessary for the laying down or building of such tubing, *conduits, pipes, dams*, poles, wires, *reservoir, plant* and power house, as well as the land overflowed, and for the erection of *tanks and reservoirs* * * * and the erection of *such building as may be necessary for the purpose aforesaid.*"

Dams, reservoirs, canals, race-ways, conduits, and pipes all involve the idea of diversion, for each necessarily causes a diversion. Nor can the water of a stream be "carried" "to any plant or power house where electricity is to be generated" without diverting it from the stream. In short, the old fashioned mill-pond on one's own land (for which no statute was necessary) would be the maximum development possible without the right of diversion, and to say that the statute here in question does not give that right is to say that the Ohio legislature's attempt "to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared" and thus "supply what, next to intellect, is the very foundation of all our achievements and all our welfare"* is futile and abortive.

Reply to Defendants' Point V.

The contention advanced by the defendants in this point is that "Plaintiff's right to condemn is not a right entitled to the protection of the Federal Constitutional guarantees."

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*Mr. Justice HOLMES in *Mt. Vernon Cotton Co. vs. Alabama Power Co.*, 240 U. S. 30, 33.

The insincerity of the contention is manifested by the fact that at page 6 of their brief, in arguing that this right of the plaintiff "is distinctly a State right," the defendants make the diametrically opposite statement that

> "It is none the less entitled to protection under both the contract impairment clause and the due process clause of the Federal Constitution."

The attempt to compare this right of the plaintiff to a liquor license or a license to practice medicine is unworthy of serious consideration. It is too late to argue that valuable privileges given by a charter which are essentially connected with the franchise and necessary to the business of the corporation and to the full enjoyment of the main object of the charter are not contract and property rights within the meaning of the Constitution. (See Point II of our original brief, and particularly pp. 32, 36, 37, 42 and 45).

To the cases there cited we add:

Davis vs. Gray, 16 Wall. 203, 228, per Mr. Justice SWAYNE:

> "The real estate of a corporation is a distinct thing from its franchises. But the right to acquire and sell real estate is a franchise, and the right to acquire the particular real estate designated in the charter of this company, and here in question, is within that category."

Morgan vs. Louisiana, 93 U. S. 217, 223, per Mr. Justice FIELD:

> "The franchises of a railroad corporation are rights or privileges which are essential to

> the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, *to appropriate earth and gravel for the bed of its road, or water for its engines, and the like.* They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked."

With reference to the comments made by the defendants at page 31 of their brief upon *Chesapeake & Ohio Canal Co. vs. Baltimore & Ohio R. R. Co.*, 4 Gill & Johns. 1, it is evident that counsel have not read the case. The discussion proceeded largely upon its constitutional aspect, and we direct particular attention to page 164 of the report of that case, where it is shown that the court was urged to *deny* rather than *sustain* the asserted Federal rights in order that the case might be brought here.

Under this point defendants make the statement that although the Traction Company did not take the legal title to the land in question until February, 1914, yet "the record shows very clearly that the property *has been owned* by The Northern Ohio Traction and Light Company ever since it was organized" and that "the defendants' ownership of the property therefore antedates plaintiff's incorporation and right to condemn property for its corporate purposes, and defendants' actual development of the property for its public use was begun before plaintiff commenced this condemnation suit." (Brief, p. 32).

The record shows nothing of the kind. The conveyance by Everett to the Realty Company was an

absolute conveyance in fee with the explicit statement that "neither the said grantor nor his heirs, nor any other persons claiming title through or under him shall or will hereafter claim or demand any right or title to the premises, or any part thereof; but they and every one of them shall by these presents be excluded and forever barred" (Record, p. 126). There is not a scintilla of evidence that either the Realty Company or the so-called Northern Ohio Power Company ever entered into any agreement to hold the land in trust for the Traction Company or that by any corporate act either of said companies ever assumed or acknowledged a trust relation with respect to it. The Traction Company's claim of ownership of the land is based purely and simply upon the fact that it *owned the stock* of these companies. Obviously such stock ownership did not make it the owner of the land.

Gibbons vs. Mahon, 136 U. S. 549, 557;
Humphreys vs. McKissock, 140 U. S. 304, 311, 312;
Saranac & L. P. R. Co. vs. Arnold, 167 N. Y. 368, 374;
Peterson vs. Chicago, R. I. & P. Ry. Co., 205 U. S., 364, 391, 393;
Conley vs. Mathieson Alkali Works, 190 U. S., 406, 409;
De La Vergne Co. vs. German Savings Institution, 175 U. S., 40, 53;
Harriman vs. Northern Securities Co., 197 U. S., 244, 297, 299;
Kardo Co. vs. Adams, 231 Fed., 950, 964, 970; per C. C. A., 6th Circuit, discussing corporate existence under Ohio Law.

In the case last cited it was said:

> "The theory of separate entity of a corporation is not disturbed by the ownership of all of its stock by another corporation. * * *
>
> "Even in cases in which all the stock of the corporation is owned by one person or another corporation, the corporate rights are distinct from the rights of stockholders. And when the cause of action relates to property and property rights, of which the corporation is vested with the legal title, the corporation is the real party in interest."

Of course corporate forms are sometimes disregarded by Courts of equity when this course is necessary to preserve the rights of innocent parties or circumvent fraud—when the corporate entity is used merely as a shield for fraudulent or other illegal acts.

> *In re Rieger, Kapner & Altmark*, 157 Fed., 609, 613, 614, D. C. S. D., Ohio, per Judge SATER;
>
> *Kardo Co. vs. Adams*, 231 Fed., 950, 966, 967;
>
> *State ex rel. vs. Standard Oil Co.*, 49 Ohio St., 137.

But no case has ever yet held that the corporation itself, or the stockholders who compose it, or any person who has been instrumental in bringing the corporation into being and holding it out to the public as a real entity, can, on an occasion when the corporate existence seems inimical to their own interests, ask the Court to disregard the corporate creation in order to defeat the rights of third parties.

> See 10 Cyc., 244, 249.

When the defendants discuss inability to agree they are very insistent upon the distinction between the corporation named The Northern Realty Company and the corporation named The Northern Ohio Traction and Light Company. They base the whole of their argument upon the existence of this distinction and press it to the extent of saying, in substance, that failure to agree with Christy as President of the Realty Company was not a failure to agree with Christy as Vice-President of the Traction Company. When they come to discuss the question of devotion to a public use they ask the Court to close its eyes to the various different corporations and the conveyances to and from them and say that they were not separate corporations but all one. This cannot be done. The Traction Company must lie in the bed it has made and accept the consequences of the indisputable fact that at the time of the commencement of this proceeding the land was owned by the Realty Company, a *mere private owner* which had not, and under its charter, could not, devote the land to any public use. Both the so-called Northern Ohio Power Company and the Traction Company stand in the position of purchasers *pendente lite* with actual and constructive notice of the plaintiff's rights; and as such they necessarily took subject to this pending proceeding.

Lewis, Eminent Domain, §537.

This rule, indeed, has been embodied in the statute of Ohio, for in §11300 of the Ohio General Code it is provided:

> "When the summons has been served or the publication made, the action is pending so as to charge third persons with notice of its

pendency. While pending, no interest can be acquired by third persons in the subject of the action, as against the plaintiff's title."

This statute is in accord, too, with the established rule that a chose in action, the right to prosecute the suit to judgment, is itself property.

Pritchard vs. Norton, 106 U. S., 132;
Cincinnati vs. Louisville & Nashville R. R .Co., 223 U. S., 390-400.

The case of *Harriman vs. Northern Securities Co.*, 197 U. S. 244, already cited, is clear and controlling in showing that the Traction Company cannot here dispute the Realty Company's position as the absolute fee simple owner of the land or its own position as a mere stockholder in that company with no title to its assets. In that case Mr. Harriman participated in the organization of the Securities Company and conveyed to it certain of his shares of stock of the Northern Pacific Railway Company and became one of the stockholders of the Securities Company. The Securities Company was subsequently adjudged to be an illegal combination in restraint of trade. In the liquidation of its assets that then took place Mr. Harriman insisted upon receiving back the identical property he had conveyed, but this relief was denied, the court holding that he had parted with his title to his Northern Pacific shares by conveying them to the Securities Company and that consequently he stood merely in the position of an ordinary stockholder and must be content with the ratable proportion of its corporate assets. In like manner even if the Traction Company could be regarded as having been the equitable owner of the

land under the so-called "Everett Trust" (which was never recorded and hence unknown to the plaintiff and was "lost" by counsel on the very eve of the trial) it voluntarily and absolutely parted with its equitable interest when it caused Everett to convey the land to the Realty Company, and even though the Realty Company and the so-called Northern Ohio Power Company were both mere "dummies" and frauds and shams and the grossest sorts of illegalities, the Realty Company's ownership of the land, unaffected by any trust or interest in the Traction Company, was placed beyond dispute on the part of the Traction Company by its conduct in having the land conveyed to it (see particularly page 297 of 197 U. S.).

Furthermore, even though the Traction Company should succeed in its attempt to have this court disregard, in its own interest, the corporate creations and conveyances which it has procured, its position in this case would not be improved. *Its mere ownership of the land does not show that it was devoted to a public use.*

It is true that a report on water power was obtained by the Akron, Bedford & Cleveland Railroad back in 1897, but *nothing was ever done with the report. It was never acted upon,* and the record may be searched in vain for a single corporate act that manifests in the slightest degree any intent whatever to devote the property to water power uses until long after the plaintiff's charter was obtained. In 1906, 1907 and 1908 officials of the Traction Company negotiated for the sale of the property (Record, pp. 228, 230). In December, 1910, they caused the land to be conveyed to a real

estate company. These negotiations disclose an absence of any fixed purpose or existing intent, and this conveyance affirmatively manifests an intent *not* to devote the property to a public use. It was not until January 31, 1911, when the property was conveyed to the so-called Northern Ohio Power Company, that there is the slightest indication of a real intent to devote the land to power house uses. True, the Traction Company sent an engineer onto the land and did some grubbing or clearing for the foundation of the steam power plant in December, 1910 (Record, pp. 77, 78). But this was done in the name of the so-called Northern Ohio Power Company (Record, p. 78), and was at most the preliminary work of promoters which took effect only when the land came under control of the Power Company.

Thus, even if the Traction Company were "the owner" it held the land as a *mere individual proprietor* and it was as much subject to appropriation by the plaintiff under the Traction Company's ownership as if it had been owned by an individual.

Oregon Washington R. & N. Co. vs. Wilkinson, 188 Fed., 363, to which we call particular attention on account of the similarity of facts;

Colorado E. Ry. Co. vs. Union Pac. Ry. Co., 41 Fed., 293;

Matter of Rochester Water Commissioners, 66 N. Y., 413, 418;

Lewis, Eminent Domain, §§420, 442, 443;

Railroad Co. vs. Village of Belle Centre, 48 Ohio St., 273.

In the case last cited it was held that land owned by a railroad company but not in use for railroad purposes might be taken.

See, also, the other authorities cited at pages 102-107 of our original brief, which clearly show that mere ownership of property, even by a corporation having the power of eminent domain, does not constitute a devotion of the land to a public use or prevent it from being appropriated by another corporation.

Reply to Defendants' Point VI.

Under this point the defendants contend that whether or not the Traction Company had the power of eminent domain for the appropriation of land for power houses is "a question of interpretation of a State statute," that "the State court has passed upon this question adversely to the contention of plaintiff," and (by way of suggestion) this Court will follow the State court even though the question resolve itself into one with reference to the character of the use, whether public or private.

The argument proceeds upon false premises.

The question as to whether the use set up in the record for the purpose of defeating the plaintiff's right to acquire the land is public or private has nothing to do with the Traction Company's power of eminent domain. The alleged devotion was not made by the Traction Company but by its "dummy," the so-called Northern Ohio Power Company, and the use of this "dummy" is private for the reasons stated at pages 55 to 69 of our original brief.

And in the language used by the Court of Appeals in ousting of its franchises another "dummy" of this very Traction Company:

> "It is no answer to say that The Northern Ohio could legally have built this new line without the use of a dummy. For the question is not what The Northern Ohio could or could not do, but what the defendant did do."
>
> Original Brief, p. 62.
> Appendix, p. 51.

We do not deny but insist upon the rule that upon the question of public and private use this Court will pay very great respect to "the deliberate judgment and matured thought of the State Courts," and we ask this Court to reverse the judgment under review for the very reason that it is a sporadic decision in direct conflict with the local policy as settled by many decisions of the State Supreme Court (see page 60 of our original brief). The defendants, for obvious reasons, carefully avoid any reference to these decisions.

There is a like failure on the part of the defendants to make any answer to Point VII of our original brief wherein it is set up that the plaintiff has a right to acquire the land despite the defendants present possession and use of it even though that use be a public one. The defendants' sole comment upon this point is:

> "This, again, is a question where this court will follow the decision of the State court" (Brief, p. 35).

But it is well settled that this Court will construe the plaintiff's contract for itself upon its own

independent judgment, and that in making such construction the Court will treat the contract as if there were embodied in its text the settled rule of law which existed in the State at the time the contract was made (pages 98-100 of our original brief).

When the contract is thus construed it is very plain that the land was not withdrawn from the plaintiff's right to acquire it; AND TO THE END THAT THE CONTRACT MAY BE ENFORCED AND PROTECTED, AND NOT IMPAIRED, THE JUDGMENT SHOULD BE REVERSED.

Respectfully submitted,

WILLIAM Z. DAVIS,
JOHN L. WELLS,
CARROLL G. WALTER,
Counsel for Plaintiff-in-Error.

May, 1917.

Office Supreme Court, U. S.
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CLERK

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 342.

THE CUYAHOGA RIVER POWER COMPANY,
Plaintiff-in-Error,

against

THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION AND LIGHT COMPANY,
Defendants-in-Error.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

APPENDIX TO BRIEF FOR PLAINTIFF-IN-ERROR.

(Containing Statutes, &c., Referred to in Brief)

WILLIAM Z. DAVIS, Columbus, Ohio.
JOHN L. WELLS, CARROLL G. WALTER, New York.
Counsel for Plaintiff-in-Error.

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CONSTITUTION OF OHIO.

ARTICLE I.

Bill of Rights.

Of the Inviolability of Private Property.

Section 19. Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

ARTICLE II.

Legislative.

In Whom Legislative Power is Vested. Initiative and Referendum.

Section 1. The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the

general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided; and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.

ARTICLE XIII.

Corporations.

Right of Way.

Section 5. No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law.

Ohio General Code of 1910.

Part Second—Civil.

Title IX. Private Corporations.

Division I. General Provisions.

Chapter 1. Organization and Powers.

Articles of Incorporation.

Section 8625. Any number of persons, not less than five, a majority of whom are citizens of this state, desiring to become incorporated, shall subscribe and acknowledge articles of incorporation, which must contain:

1. The name of the corporation, which, unless it is not for profit, shall begin with the word "the" and end with the word "company," except as otherwise provided by law.

2. The place where it is to be located, or its principal business transacted.

3. The purpose for which it is formed.

4. The amount of its capital stock, if it is to have capital stock, and the number of shares into which it is divided.

5. But, if the corporation is for a purpose which includes the construction of an improvement not to be located at a single place, the articles of incorporation must also set forth:

a. The kind of improvement intended to be constructed.

b. Its termini, and the counties in or through which it or its branches will pass. (R. S., Secs. 3236, 3237.)

Acknowledgment of Articles; Where Filed.

Section 8626. Articles of incorporation shall be acknowledged before an officer authorized to take the acknowledgment of deeds, the form of which shall be prescribed by the secretary of state. The

official character of the officer before whom articles of incorporation are acknowledged, shall be certified by the clerk of the common pleas court of the county wherein the acknowledgment is taken. Articles of incorporation shall be filed in the office of the secretary of state, who shall record them, and shall also record certificates relating to that corporation, thereafter filed in his office. (R. S., Secs. 3236, 3238.)

General Powers.

Section 8627. Upon filing articles of incorporation, the persons who subscribed them, their associates, successors, and assigns, by the name and style provided therein, shall be a body corporate, with succession, power to sue and be sued, contract and be contracted with; also, unless specially limited, to acquire and hold all property, real or personal, necessary to effect the object for which it is created, and at pleasure convey it in conformity with its regulations and the laws of this state. Such corporation also may make, use, and at will alter a common seal, and do all other acts needful to accomplish the purposes of its organization. (R. S., Sec. 3239.)

Division II. Public Service Corporations.

Subdivision I. Railroads.

Chapter I. Special Powers.

Construction.

Six Main Tracks.

Section 8745. Any railroad company may maintain and operate, or construct, maintain and

operate a railroad, with such main tracks, not exceeding six and such side tracks, turnouts, offices, depots, round-houses, machine shops, water tanks, telegraph lines, and other necessary appliances, as it deems necessary, between the points named in its articles of incorporation, commencing at or within, and extending to or into any city, village, or place named as a terminus of its road.

Appropriation of Land; Entry Upon for Examination and Survey.

Section 8759. A company or municipal corporation which owns or operates a railroad may enter upon any land for the purpose of examining and surveying its railroad line, and appropriate so much thereof as is deemed necessary for its railroad including necessary side-tracks, depots, work-shops, round-houses, and water-stations, material for construction, except timber, a right of way over adjacent lands sufficient to enable it to construct and repair its road and the right to conduct water by aqueducts and to make proper drains. (R. S., Sec. 3281.)

Chapter 10. Street and Interurban.

Appropriation of Property By Directors.

Section 9115. When it is deemed necessary by a majority of the directors of a domestic or foreign corporation owning or operating a street railway in a municipality to appropriate private property therein, in order to avoid dangerous or difficult curves or grades, or unsafe or unsubstantial grounds or foundations or to extend or shorten its railway line, or to provide land on which to extend

its power plant, such corporation may appropriate so much private property as is necessary for the extension of such power plant, or the construction, operation, and maintenance of the tracks, poles, supports, wires, cables and necessary appliances of such railway other than power houses, machine shops, stations or substations in the manner and subject to the provisions of law for the appropriation of private property by corporations. (97 v. 106 §1.)

Appropriation of Property.

Section 9119. Street, interurban or suburban railroads using other than steam as a motive power, when necessary may enter upon and use private property in the construction, alteration and operation of its road or any part thereof and for such purposes shall have all of the rights and powers of appropriation, outside of municipalities, that steam railroad companies possess.

Division VII. Miscellaneous.

Chapter 1. Provisions Relating to Certain Corporations.

Hydraulic.

Construction of Dams, Pipe Lines, etc.

Section 10128. Any company or companies organized for the purpose of erecting or building dams across rivers or streams in this state to raise and maintain a head of water, or for constructing and maintaining canals, locks, and raceways to regulate and carry such head of water to any plant or power house where electricity is to be generated, or for erecting and maintaining a line or lines of poles whereon to attach or string wires or cables

to carry and transmit electricity, or for transporting natural gas, petroleum, water or electricity, through tubing, pipes or conduits, or by means of wires, cables or conduits, or for storing, transporting or transmitting water, natural gas or petroleum or for generating and transmitting electricity, may enter upon any private land for the purpose of examining or surveying a line or lines for its tubing, pipes, conduits, poles and wires, or for a reservoir, dams, canals, raceways, plant or power-house, and for ascertaining the number of acres overflowed by reason of the construction of such dam or dams, and may appropriate so much thereof as is deemed necessary for the laying down or building of such tubing, conduits, pipes, dams, poles, wires, reservoir, plant and power-house, as well as the land overflowed, and for the erection of tanks and reservoirs for the storage of water for transportation and the erection of stations along such line or lines, and the erection of such building as may be necessary for the purposes aforesaid. (R. S., Sec. 3878.)

How Right Acquired.

Section 10129. Such appropriation shall be made in accordance with the law providing for compensation to the owners of private property appropriated to the use of corporations. So far as the rights of the public therein are concerned, the county commissioners as to county and state roads, the township trustees as to township roads, and the councils of municipal corporations as to streets and alleys in their respective jurisdictions, subject to such regulation and restrictions as they prescribe, may grant to such companies, the right to lay such tubing, pipes, conduits, poles and wires therein. But the right to appropriate for any of

the purposes above specified, shall not include or extend to the erection of any tank, station, reservoir, or building, or lands therefor, or to more than one continuous pipe, conduit or tubing or land therefor, in or through a municipal corporation, unless the council first consents thereto. (R. S., Sec. 3878.)

Right to Appropriate Public Way, How Acquired.

Section 10130. Nothing in the two preceding sections shall be construed to confer power to appropriate any portion of any street, alley, highway, or other public way or land, or to confer any right in any street, alley, highway or other public way or land situated within any municipality, without its consent. (R. S., Sec. 3878.)

Reservoirs in Certain Places Prohibited.

Section 10131. No reservoirs for the storage or transportation of water shall be constructed within the corporate limits of any municipal corporation or any public park, and all excavations, except reservoirs for storage and transportation of water, shall be well filled by such company, and so kept by it. (R. S., Sec. 3878.)

Common-carrier.

Section 10132. Such company or companies, for the purpose of transporting natural gas, oils, water, and electricity shall be a common carrier, and subject to all the duties and liabilities of such carriers under the laws of this state. (R. S., Sec. 3878.)

May Hold Certain Property.

Section 10133. Such a company may take, by purchase or otherwise, and hold, such real and per-

sonal estate, and erect or purchase the necessary buildings and machinery for carrying on the business, including all the necessary equipments and appendages of the business, such as tubing, pumps, tanks, telegraph apparatus, and engines, as may be necessary to transport oils and water through tubes and pipes. (R. S., Sec. 3879.)

Further Powers of Such Companies.

Section 10134. Such a company may transport, store, insure and ship natural gas, petroleum or water, and transport and store water, for the purpose of furnishing it to engineers employed in developing for, or in the production and transportation of petroleum, and for that purpose it may lay down, construct and maintain the necessary pipes, tubing, tanks, machinery and arrangements. (R. S., Sec. 3880.)

Part Third—Remedial.

Title III. Procedure in Probate Court.

Chapter 1. Jurisdiction.

Exclusive Jurisdiction.

Section 10492. Except as hereinafter provided, the probate court shall have exclusive jurisdiction:
* * *

7. To make inquests of the amount of compensation to be made to the owners of real estate when appropriated by any corporation legally authorized to make such appropriation.

Chapter 5. Appropriation of Property.

Appropriation of Private Property.

Section 11038. Appropriation of private property by corporations must be made according to the provisions of this Chapter. (R. S., 6414.)

When Appropriations Made.

Section 11039. Appropriations can be made only when the corporation is unable to agree with the owner, or his guardian or trustee, as to the compensation to be paid for the property, or easement or interest therein, sought to be appropriated, or when the owner is incapable of contracting in person or by agent, and has no guardian or trustee, or is unknown, or his residence is beyond the state, or unknown. (R. S., Sec. 6415.)

Appropriation of Property of Minor, Idiot, Imbecile or Insane Person.

Section 11040. Under this chapter, when the property of a minor, idiot, imbecile, or insane person, or any easement or interest therein, is sought to be appropriated by a corporation and there is a legally appointed guardian of the person and estate or of the estates, or a trustee of such minor, idiot, imbecile, or insane person, and the guardian has agreed with the corporation upon the amount of compensation to be paid for such property, easement, or interest therein, he may file with the probate court of the county wherein the property is situated, a written application for authority to convey the property or interest to such corporation. The application must fully describe the property,

right, easement or interest therein, sought to be conveyed, and set out the price agreed to be paid for it. (R. S., Sec. 6415a.)

Notice to Ward.

Section 11041. The probate judge shall order the guardian to give such notice as he deems reasonable, to the ward, of the filing of the application, and of the time set for its hearing. At the time for the hearing, if the judge finds that notice was given as ordered of the time set therefor, that the price to be paid is just, and that such conveyance will be to the best interest of his ward, he shall order the guardian to make and execute a deed to the corporation for the property or interests upon the payment of the price agreed upon by them. (R. S., Sec. 6415a.)

Petition for Appropriation.

Section 11042. In such a case the corporation may file a petition with the probate judge, verified as in a civil action, containing a specific description of each parcel of property, interest, or right, within the county, sought to be appropriated, the work, if any, intended to be constructed thereon, the use to which the property is to be applied, the necessity for the appropriation, the name of the owner of each parcel, if known, or if not known, a statement of that fact, the names of all persons having or claiming an interest, legal or equitable, in the property, so far as they can be ascertained, and a prayer for its appropriation. (R. S., Sec. 6416.)

The County Petition to be Filed in.

Section 11043. The petition may include one or more of the parcels of property, rights, or interests

in the county in which it is filed. When any such parcel, right or interest, is situated in two or more counties, the petition may be filed in either of the counties in which an owner is resident, and if no owner resides therein, it may be filed in either. (R. S., Sec. 6417.)

Summons.

Section 11044. Upon the filing of the precipe therefor, the probate judge shall issue summons for the owners, and persons named in the petition as residents of the state, having an interest, which may be directed to the sheriff of any county, and shall command him to notify the persons it names of the filing of the petition, and to appear thereto at a time to be fixed by the judge, and therein stated, not less than five nor more than fifteen days from the date thereof. It must be served and returned as in a civil action. When returned "not summoned," other writs may issue until the parties are duly summoned. (R. S., Sec. 6418.)

Service by Publication.

Section 11045. When a person having an interest is unknown, or his residence is beyond the state or unknown, the corporation may make service against him by publishing in a newspaper of general circulation in the county where the petition is filed, for four consecutive weeks, and notice containing a summary statement of the object and prayer of the petition, so far as it relates to the property of the person thus to be notified, the court in which it is filed, and the time when such person is to appear thereto, not less than ten nor more than twenty days after the last publication. The

fact of publication may be proved by the affidavit of any person having knowledge thereof. (R. S., Sec. 6419.)

Jurisdictional Questions.

Section 11046. On the day named in a summons first served, or publication first completed, the probate judge shall hear and determine the questions of the existence of the corporation, its right to make the appropriation, its inability to agree with the owner, and the necessity for the appropriation. Upon all these questions the burden of proof shall be upon the corporation, and any interested person shall be heard. (R. S., Sec. 6420.)

Jurors.

Section 11047. If, as to any or all of the property, and persons interested therein, the judge determines such questions for the corporation, he shall issue an order to the clerk and sheriff to draw sixteen names from the jury wheel, as in other cases, and within two days after the receipt of it they must execute the order, and the clerk forthwith return it to the probate judge, with a list of the names drawn endorsed thereon, who shall issue to the sheriff a venire for the jurors so drawn to attend at his office at a time to be fixed by him, and named in the writ, not exceeding ten days from the date thereof. It shall be served and returned as in other cases. (R. S., Sec. 6421.)

Who Entitled to a Separate Trial and Conduct of Trial.

Section 11048. The owners of each separate parcel, right, or interest, are entitled to a separate

trial by jury, verdict, and judgment. They shall hold the affirmative on the trial, which must be conducted, evidence admitted and bills of exception allowed as provided in civil actions. (R. S., Sec. 6422.)

Amendments.

Section 11049. The Court may amend any defect or informality in the proceedings authorized or required by this chapter or cause new parties to be added, and direct such further notice to be given to a party in interest as it deems proper. (R. S., Sec. 6423.)

Time of Trial. Adjournments, and Discharge of Jurors.

Section 11050. The Court may direct the order and fix the time of the several trials, and adjourn or continue a trial for the purpose of obtaining proper service upon a property owner; or, when deemed necessary for the proper and convenient trial of the several cases, it may discharge a jury, and cause other juries to be impaneled, as provided in this chapter. (R. S., Sec. 6424.)

How Panel Filled.

Section 11051. If, by reason of non-attendance, sickness, or other cause, any of the sixteen persons are not present and in condition to serve as jurors, the judge shall order the sheriff to fill the vacancies with talesmen. When the list of sixteen is full, the judge shall call upon each separately, beginning with the first named on the list, to take his place in the jury box, and personally inquire of each, as called, whether he is interested in any way in any of the property, rights or interests

sought to be appropriated, or in the corporation which filed the petition, either as owner, stockholder, agent, attorney, or otherwise. If such person answers in the affirmative, or if it be shown to the judge, by satisfactory evidence, that he is so interested, he shall be excused from serving on the jury, and the next person on the list be called, and interrogated in like manner. If the list of sixteen be exhausted before a proper jury of twelve men is taken and accepted therefrom, the judge shall order the sheriff to fill the remaining vacancies in the jury box required to make up the number of twelve with talesmen, who shall be interrogated as above provided. (R. S., Sec. 6425.)

Peremptory Challenges.

Section 11052. When a jury box is filled with twelve disinterested jurors, the owners of the property which is the subject of the trial, jointly, and the petitioner, shall each have the right to four peremptory challenges, and to challenge for cause. Vacancies arising in the jury from challenge, or otherwise, shall be filled with talesmen having the qualifications prescribed in the next preceding section, to be ascertained as therein provided. (R. S., Sec. 6426.)

Oath of Jury.

Section 11053. When a jury is filled, the probate judge shall administer to them the following oath: "You, and each of you, do solemnly swear that, according to your best judgment, you will justly and impartially assess the amount of compensation due to the proper owners in the cases which will be brought before you in this proceeding, by reason of the appropriation of their prop-

erty described in the petition, to the use of (here name the corporation) in the proceedings now pending, irrespective of any benefit from any improvement proposed by such corporation; and you do further swear that in assessing any damages that may occur to such property owners, by reason of the appropriation, other than the compensation, you will further ascertain how much less valuable the remaining portion of such property will be in consequence of such appropriation. This you swear as you shall answer to God." (R. S., Sec. 6427.)

The Form of Writ to Sheriff.

Section 11054. Upon motion of either party, the probate judge may issue the following writ to the sheriff, to-wit: "To the sheriff of County: You are hereby commanded to conduct the twelve jurors namel in the panel to this writ annexed, to view the property or premises sought to be appropriated by (here state the name of the corporation), and owned by (here state the name of each owner), on , the day of , then and there to view the premises or property aforesaid, in the presence of A and B on the part of the corporation aforesaid, and C and D on the part of the owner, appointed by this court, and you will make return of the manner you have executed this writ to this court, on the day of , A. D., ." The writ shall be signed by the probate judge and certified under his seal of office. (R. S., Sec. 6428.)

Judge Must Deliver Certain Copies to Sheriff.

Section 11055. The judge also shall deliver to the sheriff a copy of that part of the petition con-

taining a separate description of each parcel of property, and rights or interests sought to be appropriated within the county, which the jury is required to view. He may appoint, to be present at the view, the two persons named in the writ. The sheriff who is to execute the writ, by a special return upon it, shall certify under his hand that the view has been made according to the command thereof. The expenses of the view must be taxed in the bill of costs. No evidence shall be given on either side at its taking. (R. S., Sec. 6429.)

Witnesses Examined Before Jury.

Section 11056. Witnesses may be examined before the jury after its return to the court. If more than three witnesses be examined by either party, on the same point in the same case, the judge may tax the costs of such additional witnesses to the party calling them. (R. S., Sec. 6430.)

When a Structure is Partly on Land to be Appropriated.

Section 11057. When a building or other structure is situated partly upon land sought to be appropriated, and partly upon adjoining land, and such structure cannot be divided upon the line between such two tracts without manifest injury, in assessing the compensation to any owner of the lands, the jury shall assess its value exclusive of the structure, and make a separate estimate of the value of the structure. The owner of the structure may elect to retain its ownership, and to remove it, or accept the value estimated by the jury. If he fails to make such election within ten days from the date of the jury's report, or within ten days from the termination of the cause in a higher

court to which it is taken, he shall be deemed to have elected to retain and remove the structure. If he elects to accept the value of the structure, the title thereto shall vest in the corporation making the appropriation, with the right to enter upon the land for the purpose of removing it therefrom. (R. S., Sec. 6431.)

Verdict.

Section 11058. The jury shall render its verdict in writing, signed by the foreman, to the judge, who shall cause it to be entered of record. Unless for good cause shown, upon motion to be filed within ten days after the verdict is rendered, a new trial be granted, the judge shall enter a judgment confirming such verdict. (R. S., Sec. 6432.)

When and How Corporation May Have Possession.

Section 11059. Upon payment to the party entitled thereto, or deposit with the probate judge of the amount of the verdict and such costs as lawfully accrued in the case up to the time against the corporation, it will be entitled to take possession of, and hold, the property, rights or interests so appropriated, for the uses and purposes for which the appropriation was sought, as set forth in the petition. The judge shall enter of record an order to that effect, and if necessary, proper process shall be issued to place the corporation in possession thereof. (R. S., Sec. 6433.)

When and How Corporation May Abandon Proceeding.

Section 11060. The corporation may abandon any case or proceeding after paying into court the amount of the defendant's costs, expenses, and at-

torney fees, as found by the court. If the corporation fails in any case to make payment or deposit, as provided in the next preceding section, within thirty days after confirmation of the verdict, on motion of the party entitled to such payment, to be filed within ten days after the expiration of such thirty days, the judge shall enter an order directing the corporation to make such payment or deposit within thirty days after the date of the order. Unless such corporation, within such time makes such payment or deposit, it shall be held thereby to have abandoned the property, rights, or interests so appropriated, and all claims thereon under its proceeding, and the judge shall issue an order to that effect. He also shall enter a judgment against the corporation, and in favor of the party entitled to such payment, for such amount of expenses, including time spent and attorney fees incurred by him in the proceeding, as, upon the evidence offered in that behalf, the court deems just, for which execution may be issued against the corporation. The directors of the corporation, shall be individually liable upon such judgment, and may be made parties thereto by action. (R. S., Sec. 6434.)

Action for Costs and Expenses.

Section 11061. If such judgment is not satisfied within thirty days after its rendition, or if the party entitled thereto is not satisfied with its amount he shall have a right of action against the petitioner for such expenses, including time spent and attorney fees, and also for his expenses, including reasonable attorney fees, incurred in prosecuting such action. But it must be brought within

six months after the rendition of the judgment in the probate court. (R. S., Sec. 6435.)

New Trial, Proceedings Thereon.

Section 11062. A new trial shall be granted for cause only, shall take place in the court where the first trial was had, and be conducted in accordance with the provisions of this chapter so far as they are applicable. Upon granting the motion for a new trial, if the amount of the first verdict has been paid into court the judge shall retain it until the final termination of the second trial. On the new trial, if the verdict of the jury exceeds the amount of the first verdict, the corporation must pay the amount of the first verdict, together with the excess, to the owner of the property. When the verdict upon the second trial is less than that of the first, the judge shall repay to the corporation the difference. If a new trial be granted at the instance of the owner of the property, and the verdict of the jury be the same or less in amount than that first rendered, he must pay all the costs of the second trial. If it be more than that first rendered, the costs of the second trial must be paid by the corporation. (R. S., Sec. 6436.)

Bills of Exceptions.

Section 11063. Bills of exceptions may be taken and shall be allowed, as provided by law in civil actions. (R. S., Sec. 6437.)

Petition in Error.

Section 11064. Either party may file a petition in error in the court of common pleas of the proper county within thirty days after the time allowed

for such signing of bills of exceptions, and the proceedings in error shall be conducted as in civil cases. (R. S., Sec. 6437.)

Corporation May Pay Judgment and Enter on Property.

Section 11065. On the rendition of final judgment in the probate court, the corporation may pay into the court the amount of the judgment for compensation, and costs therein rendered, and proceed to enter upon and appropriate property notwithstanding the pendency of the proceedings in error. (R. S., Sec. 6437.)

Proceedings in the Common Pleas on Error.

Section 11066. Upon the hearing of the cause, if the common pleas court affirms the judgment of the probate court, all the costs in the common pleas court shall be paid by the plaintiff in error. If it reverses such judgment, it shall retain the cause for trial and final judgment, as in other cases. The trial shall be had at the term of reversal, unless for good cause shown by either party a continuance is granted. On the trial of the cause in the common pleas court the same inquiry shall be made as to the interest of the jurors, and the same oath administered to the jury as hereinbefore provided. (R. S., Sec. 6438.)

How School Land Appropriated.

Section 11067. When a railroad company, incorporated in this state, has located its railroad through a part of reserved section twenty-nine or sixteen, or through a part of sections granted by congress instead of section sixteen for school pur-

poses, and such lands remain unsold, or through a town lot or parcels of ground used for or devoted to school purposes, it may appropriate so much of such land or lots as is necessary for its purposes. Service of the summons made on such trustees or school officers, as have possession or control of the lands, shall have the same force and effect as service in other cases on owners of land sought to be appropriated. The money arising from such appropriation must be disposed of by such trustees or school officers in accordance with law. (R. S., Sec. 6439.)

When Proceedings to Appropriate be Commenced in Common Pleas.

Section 11068. When the probate judge is interested, either as stockholder, director or otherwise, in a corporation seeking to appropriate private property to its use, or if before filing the petition, it is made to appear to the satisfaction of a judge of the common pleas court of the county wherein the action is to be brought, that such probate judge is interested either as owner or otherwise in the property sought to be appropriated, or by reason of sickness, absence or other incapacity is and will be unable to preside at the trial, the proceedings authorized by this chapter may be commenced in the common pleas court of the county. (R. S., Sec. 6440.)

Procedure in Common Pleas Court.

Section 11069. In such case, so far as applicable, the proceedings shall conform to the provisions of this chapter, and the powers conferred and duties imposed thereby upon the probate court devolve

upon the common pleas, which court may make such orders and direct such proceedings to be had as are necessary to do justice between the parties according to the spirit and intent of this chapter. (R. S., Sec. 6440.)

When Corporations Entitled to Possession.

Section 11070. After final judgment, on depositing the amount of the judgment and costs assessed in such court with the clerk thereof, the corporation may be entitled to enter into possession of the property sought to be appropriated. In case such court is not in session when the proceedings are begun therein, nor on the day fixed for the inquiry and assessment of compensation, a special term thereof must be held as provided by law. (R. S., Sec. 6440.)

When Court to Appoint Attorney.

Section 11071. When a party in interest is unknown, or his residence is unknown, and service has been made by publication, and the party has not appeared in the proceedings by agent or attorney, or when such party in interest is under any legal disability and has no legal guardian, or trustee, within the county where the action is brought, the court shall appoint some competent attorney to attend upon the proceedings, and protect the rights and interests of such party, and also fix the fees of the attorney for such service, which will be payable out of any money paid on the judgment rendered in such case for property appropriated. (R. S., Sec. 6441.)

Conflicting Claims.

Section 11072. When there are diverse or conflicting claims, legal or equitable, to the real estate, or any interest therein, sought to be appropriated under the provisions of this chapter, the jury or court shall not pass upon them in the proceedings for appropriation. Such claims shall be reserved for adjudication as hereinafter provided. (R. S., Sec. 6442.)

To be Adjudicated in the Common Pleas.

Section 11073. Upon the payment of the money into court by the corporation, a party claiming a legal or equitable interest in the property, or the money arising therefrom by such appropriation, may file his petition in the common pleas court of the proper county, making the other claimants to the property or money parties thereto, setting forth the facts on which the claim is founded, the fact of the appropriation of the property, the amount of money so paid in and such other facts as are required to enable the court to hear and determine the matter between the claimants. (R. S., Sec. 6443.)

Custody of Funds.

Section 11074. The court forthwith shall appoint some master, or other suitable person selected by the parties, to hold such fund, or invest it in the manner the court directs, after hearing the parties. Such fund thenceforth will represent the land, and the interests therein, and be subject to the control of the court having jurisdiction of the case, by orders entered in this action, according to the rights of the parties to the land or fund, as from time to time it determines. (R. S., Sec. 6443.)

Such Proceeding a Civil Action.

Section 11075. Such proceeding in the court of common pleas, shall be a civil action; and the conflicting claims of parties to such fund shall be determined by the court, or by a jury trial, according as the claim is equitable or legal, as if the land had not been converted into money. (R. S., Sec. 6444.)

Condemnation of Unfinished Road Bed.

Section 11076. A railroad corporation of this state may condemn and appropriate to its own use the interest and easement in and quiet title to any unfinished roadbed, or part thereof, lying within the state, and on the line of its proposed road, owned or claimed by another railroad company or companies, person or persons, partnership or corporation, when such roadbed, or part thereof, has remained in an unfinished condition, and without having the ties and iron placed and continued thereon for the period of five years or more, immediately preceding the commencement of proceedings to condemn or appropriate it as herein authorized. Every such company, or companies, person or persons, partnership or corporation shall be made a party defendant to such proceedings to condemn or appropriate it, and be required to answer therein, setting forth fully its or their title to or interest in such roadbed, or part thereof, so sought to be appropriated, if any, it or they claim, to which answer the plaintiff must plead issuably, unless it admits the validity of the defendant's claim. In such case, if a party defendant be a non-resident of this state, or a foreign corporation, service of summons may be made by publication, as in other proceedings to

appropriate the property of foreign corporations, or persons not residing in Ohio. (R. S., Sec. 6445.)

Construction of Terms.

Section 11077. The terms "company or companies" used in this chapter, also embrace "person or persons," "partnership or corporation" as used in the next preceding section. (R. S., Sec. 6445.)

Proceedings.

Section 11078. When it is determined by the court, upon issue of law, or by the jury upon issue of fact, or by the admission of the pleadings, or by reason of failure to plead that any company asserting such ownership or claim is not entitled thereto, judgment, including costs, must be rendered accordingly. But when in like manner it is determined that such a company has an interest in such roadbed, or part thereof, so sought to be appropriated, the jury shall determine and state the amount of compensation due to such company, according to law, on account of the appropriation of such interest. (R. S., Sec. 6446.)

Where Action to be Begun.

Section 11079. Such proceedings may be commenced in the probate court, the common pleas or the superior court of any county in which such roadbed, or part so sought to be appropriated or condemned is situated. All or part only of such roadbed within this state may be included in one proceeding, and when it is begun in the common pleas or superior court, the same proceedings shall be had as are prescribed in this chapter for its conduct in the probate court, so far as applicable and

not excepted in this action. On motion, the case shall be taken out of its order by the court or by a reviewing court, and determined without unnecessary delay. The provisions of this chapter as to viewers shall not apply to appropriations of roadbeds as herein authorized. (R. S., Sec. 6447.)

Error.

Section 11080. Proceedings in error to such common pleas or superior courts, may be commenced directly in the supreme court. (R. S., Sec. 6447.)

Statement of Intention.

Section 11081. When a railroad corporation commences proceedings under Section 11076, its president shall make, subscribe and file in the court where such proceeding is had a statement under oath, declaring that it is the bona fide intention of such corporation to complete and operate a railroad on the roadbed so sought to be appropriated. (R. S. Sec. 6447.)

Failure to Occupy Roadbed for One Year.

Section 11082. For a period of one year after it acquired right to occupy the roadbed, if such corporation fails to expend in and about the completion of a railroad thereon a sum equal to twenty-five per cent. of the total cost of completing it, to be estimated by a railroad commission of Ohio, then such roadbed will be open to appropriation and condemnation by any other railroad corporation. (R. S., Sec., 6447.)

Interpretation of Word "Roadbed."

Section 11083. The word "roadbed" used in any of the preceding sections includes rights of way, depot grounds, and other easements connected

therewith, and it will be sufficient in the petition and proceedings under this chapter to designate the roadbed as the roadbed of the railroad corporation by which the route of the road was located and established with the terminal points within which appropriation is sought. (R. S., Sec. 6447.)

Proceedings When Land is Held Without Agreement.

Section 11084. When a corporation, authorized by law to make appropriation of private property or lands reserved for school purposes, has taken possession of and is occupying or using the land of any person, or such school lands for any purpose, and the land so occupied or used has not been appropriated and paid for by the corporation, or is not held by an agreement in writing with the owner thereof, or the trustees or school officers having possession or control of such school lands, such owner or owners, or either of them, or such trustees or school officers, may serve written notice upon the corporation in the manner provided for the service of summons against a corporation, to proceed under this chapter to appropriate the lands. On the failure of such corporation for ten days so to proceed, the owner or owners or such trustees or school officers may file a petition in the probate court of the proper county setting forth the fact of such use or occupation by the corporation, that the corporation has no right, legal or equitable, thereto, and in cases of reserved sections sixteen and twenty-nine, or any part of sections granted by congress instead of section sixteen for school purposes, no right, legal or equitable, derived from the trustees and officers named therein, that such notice has been duly

served, that the time of limitation under the notice has elapsed, and such other facts, including a pertinent description of the land so used or occupied, as are proper to a full understanding of the case. (R. S., Sec. 6448.)

Demand of Written Statement Describing the Land Occupied Without Appropriation.

Section 11085. Such owner or owners, or such trustees or school officers, intending to institute such proceeding, may demand, in writing, from the president or chief officer of such corporation a specific description of each parcel of land so used or occupied without appropriation by it, of the work, if any, constructed or intended to be constructed thereon, and the use to which it is to be applied. Upon failure of the corporation for ten days to furnish this as fully as would be required of it in a proceeding to appropriate lands, the fact of such demand and failure may be alleged in the petition in such proceeding. On notice to the corporation and proof thereof to the probate judge having jurisdiction of such appropriation, he shall restrain it from the use and occupation of the land until such demand is complied with. Or, such owner or owners, or trustees or school officers may cause the necessary surveys to be made therefor, and the costs thereof must be taxed to the corporation in such proceeding. (R. S., Sec. 6448.)

Summons.

Section 11086. A summons shall issue and be served upon the corporation, and thereafter the proceedings in such court be conducted to final judgment as provided in this chapter. (R. S., Sec. 6449.)

Judgment and Execution.

Section 11087. If the corporation fails to pay the judgment and costs awarded against it in the proceeding, they may be collected by execution as in other cases. This section and the next preceding section shall not impair or lessen the right the owner or owners or the trustees or school officers may have to proceed against the corporation as in other cases of the unlawful entry upon lands. (R. S., Sec. 6449.)

Injunction May Issue Against Corporation.

Section 11088. If execution issued as provided in the next preceding section be returned unsatisfied, in whole or in part, with the endorsement that no goods, chattels, lands or tenements, can be found whereon to levy, or if the judgment remains unsatisfied for more than sixty days from its rendition, the court, by injunction, may restrain the corporation from using or occupying the lands until the judgment and costs are paid. (R. S., Sec. 6450.)

Fees.

Section 11089. The jurors summoned, and attending or serving, in accordance with the provisions of this chapter, shall be paid the same fees per day as jurors in the court of common pleas, and also five cents per mile for each mile of the distance they travel in the discharge of their duties. Witnesses must be allowed the same fees and mileage as for attendance at the court of common pleas. The sheriff shall be entitled to such fees as he is allowed by law for similar services in other cases, but not

anything in the way of poundage, except on money made on execution. The clerk shall be entitled to a fee of one dollar and fifty cents for drawing, and certifying to the probate judge, the list of jurors. The probate judge shall be allowed to enter a charge of five dollars in the cost bill for each day occupied in the trial of a cause, in addition to his other fees provided by law. The whole costs so taxed must be adjudged against and paid by the corporation, except as provided in the next following section. (R. S., Sec. 6451.)

When Costs Apportioned.

Section 11090. A corporation, by its proper officer, agent, or attorney, at the time of filing the petition with the probate judge, may deposit with him such sum of money, for each separate parcel of property as it deems a just compensation for the property, rights, and interests described in the petition, and sought to be apportioned. If the final verdict of the jury as to any parcel of property does not exceed the amount so deposited, and the owner has refused, after notice of such deposit, to accept it, the whole costs of the proceeding as to such parcel shall be equally divided between the corporation and the owner or owners of the property. When the final verdict as to any parcel or parcels exceeds, and as to other parcel or parcels does not exceed, the amount deposited, the probate judge shall apportion the costs in such manner as he deems just. (R. S., Sec. 6452.)

When This Chapter Does Not Apply.

Section 11091. The provisions of this chapter shall not apply to proceedings by state, county, township, district, or municipal authorities, to appropriate private property for public uses, or for roads or ditches. In all such cases it shall be op-

tional with such authorities to pay the judgment rendered against them, or to pay the costs and decline to take the property sought to be appropriated. (R. S., Sec. 6453.)

Ohio Public Service Commission Act,

Effective June 30, 1911.

(102 Ohio Laws, 549-575.)

Name. Additional Powers, Duties and Jurisdiction Imposed and Conferred.

Section 2. The railroad commission of Ohio shall hereafter be known as the public service commission of Ohio. In addition to the powers, duties, and jurisdiction conferred and imposed upon said commission by chapter one, division two, title three, part first, of the General Code, and the acts mandatory or supplementary thereto, the public service commission of Ohio shall have and exercise the powers, duties, and jurisdiction provided for in this act.

Definitions.

Section 3. The following words and phrases used in this act, unless the same be inconsistent with the text shall be construed as follows:

* * * * * * * * *

Any person or persons, firm or firms, copartnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated:

* * * * * * * * *

When engaged in the business of supplying electricity for light, heat or power purposes to consumers within this state, is an electric light company.

* * * * * * * * *

When engaged in the business of operating, as a common carrier, a railroad, wholly or partly within this state, with one or more tracks upon, along, above or below any public road, street, alley, way or ground, within any municipal corporation, operated by any motive power other than steam, and not a part of an interurban railroad, whether such railroad be termed street, inclined plane, elevated, or underground railroad, is a street railroad company;

When engaged in the business of operating as a common carrier, whether wholly or partially within this state, a part of a street railway constructed or extended beyond the limits of a municipal corporation, and not a part of an interurban railroad is a suburban railroad company;

When engaged in the business of operating a railroad, wholly or partially within this state, with one or more tracks from one municipal corporation or point in this state to another municipal corporation or point in this state, whether constructed upon the public highways or upon private rights-of-way, outside of municipalities, using electricity or other motive power than animal or steam power for the transportation of pasengers, packages, express matter, United States mail, baggage and freight, is an interurban railroad company, and included in the term "railroad" as used in section 501 of the General Code. The term "railroad,"

when used in this act, includes all railroads, interurban railroad companies, express companies, freight line companies, sleeping car companies, equipment companies, car companies, water transportation companies, and all persons and associations of persons, whether incorporated or not, operating such agencies for public use in the conveyance of persons or property within this state.

"Public Utility" Defined.

Section 4. The term "public utility" as used in this act, shall mean and include every corporation, company, co-partnership, person or association, their lessees, trustees or receivers, defined in the next preceding section, except such public utilities as operate their utilities not for profit, and except such public utilities as are, or may hereafter be owned or operated by any municipality, and except such utilities as are defined as "railroads" in sections 501 and 502 of the General Code and these terms shall apply in defining "public utilities" and "railroads" wherever used in chapter one, division two, title three, part first of the General Code and the acts amendatory or supplementary thereto or in this act.

Jurisdiction to Regulate "Public Utilities" and "Railroads."

Section 5. The public service commission of Ohio is hereby vested with the power and jurisdiction to supervise and regulate "public utilities" and "railroads" as herein defined and provided and to require all public utilities to furnish their products and render all services required by the commission, or by law.

Section 6. The jurisdiction, supervision, powers and duties of the public service commission shall extend to every public utility and railroad, the

plant or property of which lies wholly within this state and when the property of a public utility or railroad lies partly within and partly without this state to that part of such plant or property which lies within this state, and to the persons or companies owning, leasing or operating the same, and to the records and accounts of the business thereof done within this state.

General Supervision.

Section 10. The commission shall have general supervision over all public utilities within its jurisdiction as hereinbefore defined, and shall have the power to examine the same and keep informed as to their general condition, their capitalization, their franchises and the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, and also with respect to the safety and security of the public and their employes, and with respect to their compliance with all provisions of law, orders of the commission, franchises and charter requirements. The commission, either through its members or inspectors or employes, duly authorized by it, may enter in or upon, for purposes of inspection, any property, equipment, building, plant, factory, office, apparatus, machinery, device and lines of any public utility.

Power to Issue Stocks, Bonds, etc.

Section 56. A public utility or a railroad, as defined in this act, may, when authorized by order of the commission, and not otherwise, issue stocks, bonds, notes and other evidences of indebtedness, payable at periods of more than twelve months af-

ter date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvement of its facilities or for the improvement or maintenance of its service, or for the reorganization or readjustment of its indebtedness and capilitalization, or for the discharge or lawful refunding of its obligations, or for the reimbursement of moneys actually expended from income or from any other moneys in the treasury of the public utility or railroad not secured or obtained from the issue of stocks, bonds, notes or others evidences of indebtedness of such public utility or railroad within five years next prior to the filing of an application therefor as herein provided, or for any of the aforesaid purposes except maintenance of service and except replacements in cases where the applicant shall have kept its accounts and vouchers of such expenditures in such manner as to enable the commission to ascertain the amount of money so expended and the purposes for which said expenditure was made.

Commission May Authorize Issue.

The commission may, by order duly made, authorize the issue of bonds, notes, or other evidence of indebtedness, for the reimbursement of money heretofore actually expended from income for any of the aforesaid purposes, except maintenance of service and replacements prior to five years next preceding the filing of an application therefor, if such application for such consent be made prior to January 1, 1913.

Provided, however, that it shall be the duty of the commission to authorize, on the best terms obtainable, such issues of stocks, bonds and other evidence of indebtedness as shall be necessary to enable any public utility to comply with the provi-

sions of any contract heretofore made between such public utility and any municipality.

Proceedings to Obtain Authority.

Section 57. The proceedings for obtaining the consent and authority of the commission for such issue as provided in the next preceding section of this act, shall be as follows:

(a) In case the stocks, bonds, notes, or other evidence of indebtedness are to be issued for money only, the public utility or railroad shall file with the commission a statement, signed and verified by the president and secretary thereof, setting forth:

(1) The amount and character of the stocks, bonds or other evidence of indebtedness.

(2) The purposes for which they are to be issued.

(3) The terms upon which they are to be issued.

(4) The total assets and liabilities of the public utility or railroad in such detail as the commission may require.

(5) If the issue is desired for the purpose of the reimbursement of money expended from income, as herein provided, the amount expended, when and for what purposes expended.

(6) Such other facts and information pertinent to the inquiry as the commission may require.

(b) If the stocks, bonds, notes or other evidence of indebtedness are to be issued, partly or wholly

for property or services or other consideration than money the public utility or railroad shall file with the commission a statement, signed and verified by its president and secretary, setting forth:

(1) The amount and character of the stocks, bonds or other evidence of indebtedness proposed to be issued.

(2) The purposes for which they are to be issued.

(3) The description and estimated value of the property or services for which they are to be issued.

(4) The terms on which they are to be issued or exchanged.

(5) The amount of money, if any, to be received from the same in addition to the property, service or other consideration.

(6) The total assets and liabilities of the public utility or railroad in such detail as the commission may require.

(7) Such other facts and information pertinent to the inquiry as the commission may require. Provided, however, that this section or the preceding section shall not apply to union depot companies heretofore organized, and under contract until the same are completed.

Consent and Approval of Commission.

Section 63. With the consent and approval of the commission, but not otherwise:

(a) Any two or more public utilities, furnishing a like service or product and doing business in the same municipality or locality within this state, or any two or more public utilities whose lines intersect or parallel each other within this state, may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other.

(b) Any public utility may purchase, or lease the property, plant or business of any other such public utility.

(c) Any such public utility may sell or lease its property or business to any other such public utility.

(d) Any such public utility may purchase the stock of any other such public utility.

The proceedings for obtaining the consent and approval of the commission for such authority, shall be as follows:

There shall be filed with the commission a petition, joint or otherwise, as the case may be, signed and verified by the president and secretary of the respective companies, clearly setting forth the object and purposes desired, stating whether or not it is for the purchase, sale, lease or making of contracts or for any other purpose in this section provided and also the terms and conditions of the same. The commission shall, upon the filing of such petition, if it deem the same necessary, fix a time and place for the hearing thereof. If, after such hearing or in case no hearing is required, the commission is satisfied that the prayer of such pe-

tition should be granted and the public will thereby be furnished adequate service for a reasonable and just rate, rental, toll, or charge therefor, it shall make such order in the premises as it may deem proper and the circumstances require, and thereupon it shall be lawful to do the things provided for in such order.

Void Contracts.

Section 65. All such contracts, leases, purchases, sales or consolidations not made pursuant to the provisions of this act or contrary hereto shall be void and of no effect.

Opinion in White v. Little Miami Light, Heat & Power Co.

[From 5 Ohio Nisi Prius Reports (N. S.), 201.]

EMINENT DOMAIN FOR THE PURPOSE OF CREATING WATER POWER.

(Probate Court of Clermont County.)

THE LITTLE MIAMI LIGHT, HEAT & POWER COMPANY

v.

JOHN T. WHITE *et al.**

Decided December 19, 1906.

Legislative Authority to Confer the Right of Eminent Domain—May be Granted to a Water Power Company—Where the Stream is not Navigable—Courts Will Not Interfere, Unless—Constitutionality of Section 3878.

1. Section 3878, Revised Statutes, as amended April 23, 1904, is a proper exercise of the constitutional power of the General Assembly, and not an abuse thereof.

*Affirmed by the common pleas, February 26, 1906, without report. Affirmed by the Circuit Court April 10, 1907, when the above opinion was read, approved and adopted by Swing, J., Giffin and Smith, JJ., concurring.

Note.—Judgment of Circuit Court affirmed by Supreme Court in 1908 as stated in brief.

2. The General Assembly possesses the constitutional power to confer upon a corporation the right to appropriate land for the erection of dams in non-navigable streams for the purpose of raising a head of water as power for the generation of electricity.

3. The judiciary will not interfere with the exercise of legislative authority in conferring the power of eminent domain, unless there appears to be a gross and manifest abuse of such authority.

PAXTON, J.:

The plaintiff corporation filed its petition in this Court for the appropriation of a tract of land consisting of about eight acres in Miami township, in this county, on the waters of the Little Miami River, the petition being in the usual form and containing the usual allegations of petitions for the appropriation of real estate. The defendants, John T. White *et al.*, having been duly served with summons, the cause came on for hearing upon the preliminary questions on December 19th, 1906. Afterwards a jury was called and empaneled, testimony of witnesses heard and a verdict for the defendants, John T. White *et al.* returned by the jury. A motion for a new trial was made by defendants and overruled, and judgment rendered on the verdict.

The matters presented to this Court for determination are those involved in the following preliminary questions, viz.:

1. The corporate existence; 2, Inability to agree with the owner; 3, The necessity for the appropriation; 4, The right to make the appropriation.

The plaintiff offered satisfactory and conclusive evidence to prove the facts involved in the preliminary questions, the defendants offering no evidence, but contending that the objects and purposes of the plaintiff corporation, as stated in its articles of incorporation, are such that it cannot properly be vested with the right of eminent domain, and that the land sought to be appropriated is not necessary for the purposes of the company.

The plaintiff corporation was incorporated on the 23rd day of July, 1906, under the general law of the State of Ohio. Following is a statement of the purposes of said company as the same are expressed in its articles of incorporation, viz.:

> "Third. Said corporation is formed for the purpose of acquiring, erecting, building, maintaining and operating dams in the Little Miami River, in the State of Ohio, to raise and maintain a head of water; of constructing and maintaining canals, locks and raceways to regulate and carry said head of water to any plant or power house where electricity is to be generated; of erecting and maintaining a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity; of acquiring, producing, manufacturing, generating and selling electricity for light, heat, power and other purposes; of acquiring, holding and selling franchises and privileges to supply the same to municipal corporations; of acquiring by condemnation, lease, purchase or otherwise, and of possessing, holding and selling such real estate and personal property as may be necessary or convenient for the proper conduct of said business, and of doing any and all other things necessary and incident to any of said purposes. Said company's improvements are to begin at the confluence of the Ohio and the Little Miami Rivers, in Hamilton

County, Ohio, and extend along the said Little Miami River and through the Counties of Hamilton, Clermont and Warren, to a point in said river opposite the Village of Morrow in said last named county."

Plaintiff claims the right of eminent domain under the provisions of Section 3878, Revised Statutes of Ohio, as amended April 23, 1904 (97 O. L., 300). By reference to that section it appears that the purposes for which the corporation is created bring it clearly within the meaning of that section, and give to it the right to appropriate private property. But it is claimed that the purposes and objects of the plaintiff corporation are such as to bring it within the limitation of the constitutional inhibition; that the use for which it is sought to appropriate the land is a private and not a public use (Section 19, Article I, and Section 5, Article XIII of the Constitution of Ohio).

The question, therefore, is: Had the Legislature the power to confer upon the corporation the right to condemn property for the purposes expressed in its articles of incorporation?

It has been held that the sections of the Constitution, above referred to, do not confer the power of eminent domain, but simply designate means for, and limitations upon, its exercise. This is in accordance with the definition of eminent domain that it is "a right inherent in all sovereignties, and, therefore, would exist without any constitutional recognition;" that it antedates Constitutions, which are only declaratory of previously existing universal law, and is not conferred, but is limited by them; that the title in fee of all property is held subject to the public user, of the neces-

sity or expediency of which use the Government itself must judge. And it is on the ground of the general public good that the Legislature grants to companies or bodies the compulsory power of taking the property of individuals.

The question whether or not a contemplated use is a public use, or for the public welfare, within the meaning of the Constitution, is one for the Legislature.

> Giesy *v.* C. W. & Z. Railroad Co., 4 Ohio State, 326.

In deciding the case last referred to, Justice Ranney makes the following statement:

> "In saying that the exercise of this power properly belongs to the General Assembly and not to the judiciary, I do not intend to express a doubt that in cases where its limits have been exceeded, or its spirit and purpose abused, a judicial remedy may not be afforded."

The plain and obvious meaning of which is, that unless there should be a gross and manifest abuse of the power by the Legislature, the judiciary should not assume to determine it.

In this case the Legislature has declared that the use is a public one, and the Courts should hold it to be such, unless it manifestly has no tendency to promote such use (12 Cush., Mass., 475). There is a presumption in favor of the public character of the use arising from its having been authorized by the Legislature (12 Cush., Mass., 475). No general definition of what degree of public good will meet the constitutional requirement for a "public use" can be framed, as it is in every case a question of local policy.

Under certain general principles, however, upon which the decisions are based, the term "public use" is usually intended to cover a use affecting the public in general, or any number thereof, as distinguished from particular individuals. If the use is in fact a public one, its character is not changed by the fact that the control of the property sought to be taken will be vested in private persons, or private corporations, actuated solely by motives of private gain, and that private purposes will be thereby incidentally served.

On this subject the Supreme Court of Ohio has said, in Giesy *v.* C. W. & Z. Railroad Co., 4 Ohio State, 326:

> "It rests upon the public necessity—subordinates the rights of one to the welfare of all—and is just as broad as that necessity, and no broader. If the wants of the public are attained by the acquisition of an *easement,* nothing more can be taken; if the whole interest is required, the whole may be appropriated. Whether this power is derived from an implied condition in every grant, by which property is held under the Government, and whether where no constitutional restraints exist, it may be exercised without making compensation, are rather questions for ingenious speculation, than of practical importance."

There are numerous authorities sustaining the constitutionality of acts authorizing the flowage of water and the erection of dams in streams for the purpose of furnishing power to run mills of various kinds, but by reason of the comparatively recent date of the employment of electricity as power for general purposes, decisions are not to be found which are directly in point in the present case.

The non-navigable character of the Little Miami River, between the points named in plaintiff's articles of incorporation, is well established, thus taking out of the question the rights of the public in regard thereto. If we compare the purposes of this plaintiff with the purposes and uses of the mills above referred to and their respective relations to the public, it certainly will appear that the importance of plaintiff's proposed use of its powers is of vastly greater benefit to the public. The successful and economical generation of electricity by water power has long passed the experimental stage and its many uses for public and private purposes may not now be enumerated.

On the authorities, and for the reasons above given, judgment is rendered in favor of the plaintiff on all the preliminary questions in this case.

Opinion of Court of Appeals in Quo Warranto Case.

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO.

THE STATE OF OHIO, on the Relation of Timothy S. Hogan, Attorney General, Plaintiff, vs. THE CLEVELAND, BEDFORD & GEAUGA LAKE TRACTION CO., Defendant.	No. 3284.

Decision.

Rendered on Tuesday, the 10th day of February, A. D. 1914.

SAYRE, J.; ALLREAD, J., and KUNKLE, J., concur.

The first question which arises in this case is, was the defendant a corporation, and was the statute complied with so as to create a corporation in contemplation of law. We are met by the case of The State of Ohio, on the relation of the Attorney General vs. Cincinnati Gas-Light and Coke Company, 18 O. S., 262. The first paragraph of the syllabus in that case reads as follows:

> "The information having been filed by the attorney general under the act of May 1, 1852,

> against the defendant, by its corporate name, charging a usurpation of certain corporate franchises, and process having been issued and served accordingly, and the defendant having appeared and pleaded in a corporate capacity, setting up its charter, etc., it is not competent for the state, by replication, to deny the corporate existence of the defendant. Where the franchise to be a corporation is intended to be drawn in question, the proceedings should, under our statutes, be against the individuals who usurp such franchises."

The statute by favor of which this suit is brought is substantially the same as the act of May 1, 1852. The State, therefore having brought this suit against the defendant as a corporation, and process having been issued and served accordingly, can not now in this action challenged the legal incorporation of the defendant. The question for determination then is, whether the defendant "has misused a franchise, privilege, or right conferred upon it by law * * * or has exercised a franchise, privilege, or right in contravention of law"—paragraph 4, section 12304.

The defendant is charged with misusing its corporate rights by:

(a) Violating sections 8806, 8807, and 8808;

(b) Making the conveyance of October 10, 1912;

(c) Appropriating land for the benefit of another.

Sections 8806, 8807 and 8808 apply only to railroads and not to interurban roads, which are classed with street railroads.

Ohio Electric Ry. Co. vs. Ottawa, 85 O. S., 229.

It is contended by plaintiff that by making the contract of October 10, 1912, conveying its real estate to The Northern Ohio Traction and Light Company, the defendant abandoned the land which it acquired by appropriation, and the attempt to so convey was a misuse of its corporate franchise.

This contention and the other one made by counsel for the state, viz.: that the appropriation of land was for the sole benefit of The Northern Ohio Traction and Light Company, may be considered together.

The evidence clearly establishes the fact that the defendant is, and always has been, "the dummy" of The Northern Ohio Traction and Light Company. Smartt, the promoter of the defendant company and the only person outside of the officers of the former who had any interest in the same, was the hired servant of The Northern Ohio. He was its man, and entirely under its control. The contract of November 24, 1906, authorized The Northern Ohio to run its limited cars over the tracks of defendant and thus the defendant, by reason of the track being within a distance of 200 to 800 feet from the track of The Northern Ohio, would come into competition with the later company for the local traffic. The Ohio Northern would doubtless never have entered into such contract without expecting and intending to have com-

plete control of the defendant company. This fact together with the other evidence in the case would demonstrate that from the beginning the defendant company was to be and has been the mere creature of The Northern Ohio. Its life depends upon the will of its master. It is fair, therefore, to conclude that the appropriation of property by the defendant was for the benefit of The Northern Ohio, and the sale of October 10, 1912, was for the same purpose.

The contracts of November 24, 1906, and October 12, 1912, were thinly veiled attempts to conceal the real situation.

It is no answer to say that The Northern Ohio could legally have built this new line without the use of a "dummy." For the question is not what The Northern Ohio could or could not do, but what the defendant did do.

See

Platt vs. Pennsylvania Company, 43 O. S., 339.

In appropriating land for the benefit of another company, and in transferring such land to that company, the defendant has misused its corporate franchise. If the defendant company had appropriated the land for its own purposes, in good faith, as would appear on the face of the contract of November 24, 1906, and then had conveyed the property to The Northern Ohio the case would fall within the rule announced in Garlick vs. Railway Co., *et al.*, 67 O. S., 223. But here the property was appropriated, in the first instance, for the sole benefit of The Northern Ohio.

It therefore remains for the court to determine what the judgment shall be.

The greater part of the right of way was purchased. There were only a few appropriation proceedings. Counsel say that no more is intended. Be that as it may, it is difficult to see why the court should go to the limit of ousting the defendant of its franchise to be a corporation, and yet the court would, no doubt, fail in its duty if it did not oust the defendant of its right to appropriate private property. This will not be a heavy punishment if the defendant never has reason again to desire to exercise this right; but it may so desire and because of its past conduct this right should be taken away.

Decrees accordingly.

Opinion of Circuit Court as to Sufficiency of Description.

State of Ohio, }
Summit County, } ss.:

IN THE CIRCUIT COURT,

EIGHTH CIRCUIT.

OCTOBER TERM, 1911.

THE CUYAHOGA RIVER POWER CO., Plaintiff in Error, vs. THE NORTHERN REALTY COMPANY, Defendant in Error.	No. 992, Opinion. Rendered Oct. 27, 1911.

Error to the Court of Common Pleas.

MARVIN, WINCH AND HENRY, JJ.

MARVIN, J.,

The parties here are as they were in the court below. The action was begun in the Probate Court, in which the plaintiff sought to appropriate, and have damages assessed for the appropriation of certain real estate of the defendant.

The Probate Court dismissed the petition, and on error in the Common Pleas Court, such judg-

ment of dismissal was affirmed. It is here sought to reverse the judgments.

The only question presented, which, in our view of the case, requires our consideration, is whether the description in the petition of the lands sought to be appropriated, is sufficient under the statute. By section 11042 of the General Code of the state, it is provided that in proceedings for appropriation of real estate, "The corporation may file a petition with the Probate Judge, verified as in a civil action, containing a specific description of each parcel of property.....within the county sought to be appropriated," etc. The description given in the petition in this case is in these words:

> "Situated in Summit County, Ohio, and beginning at the point in the intersection of the center of the Cuyahoga River and the north and south township line between Portage Township and Cuyahoga Falls Township; thence north 0 degrees 30′ east 100 feet; thence easterly and southeasterly along the northerly bank of said Cuyahoga River 100 feet distant from the center line of said river, following the meandering of the same, to a point on the line between the property of said The Northern Realty Company and the property of the A. B. & C. R. R. Company, said point being 100 feet distant from the center of the Cuyahoga River, measured at right angles with same; then south 1 degree 20′ west along said line between the property of The Northern Realty Company and the property of the A. B. & C. R. R. Company; thence south 88 degrees east along the south line of the property of the A. B. & C. R. R. Company, said line being the dividing line between the property of

the A. B. & C. R. R. Company, and the property of The Northern Realty Company, to a point 100 feet distant from the center of the Cuyahoga River, measured at right angles with same; thence southeasterly and northeasterly along the northerly bank of the Cuyahoga River 100 feet distant from the center line thereof, and following the meanderings of same, to a point on a line of the land of said The Northern Realty Company, said line being an extension northerly of the east line of Tract No. 3, Portage Township, Summit County, Ohio, and also being 100 feet distant from the center of the Cuyahoga River measured at right angles with same; thence northerly along said line to a stone pipe; thence northerly along the high bank of the Cuyahoga River and one rod westerly of same the following courses and distances: north 34 degrees 35′ east 264 feet; thence north 27 degrees 35′ east 286.44 feet; thence north 2 degrees 30′ west 116.16 feet; thence north 24 degrees 10′ west 138 feet; thence north 8 degrees 40′ east 107.6 feet; thence north 19 degrees 31′ east 108.24 feet; thence north 36 degrees 40′ east 168.3 feet; thence north 53 degrees 40′ east 454.7 feet; thence north 35 degrees east 280.7 feet to the northeast corner of the lot owned by Tom Patterson; thence northerly following along the westerly bank of said Cuyahoga River to the southeast corner of the property formerly belonging to The Falls Rivet & Machine Company; thence along the line between the land formerly belonging to The Falls Rivet & Machine Company and the property of The Northern Realty Company to a point on the westerly bank of said river, where said boundary line crosses said river; thence south 75 degrees east 157 feet along the line between the property formerly belonging to The Falls Rivet & Machine Company and the lands of said The

Northern Realty Company to a point on the top of the bank on the easterly side of said Cuyahoga River; thence south 23 degrees west 118.80 feet along the top of said east bank; thence south 63 degrees east 52 feet to the west line of Water Street where an iron grate bar is set; thence south 22 degrees 30′ west 660 feet along the west line of Water Street to an iron pin; thence south 17 degrees 30′ west 663.34 feet along the west side of Water Street to an iron pin; thence north 63 degrees 37′ west 128.4 feet along north line of land formerly belonging to C. S. Sill to an iron pipe; thence south 31 degrees 30′ west 317.46 feet along the west line of same land to an iron pipe; thence south 41 degrees 30′ west 341.88 feet along the west line of said Sill's land to an iron pin; thence southerly and westerly along the southerly bank of said Cuyahoga River and approximately 100 feet distant from the center line of said river; following the meanderings of same to a point on the north and south township line between Portage Township and Cuyahoga Falls Township; thence north 0 degrees 30′ east along said township line 100 feet to the place of beginning. Contains 40 acres more or less, with all the privileges, easements, rights and appurtenances thereunto belonging."

It will be noticed that the point of beginning is fixed and definite; that courses, distances and monuments are given in the description, so that the boundary can be followed up to and including the monument, from which, the line next before the last boundary line is given. This monument is an iron pin in the west line of land formerly belonging to C. S. Sill. Going thence to the point at which the description ends, viz: the place of be-

ginning, from this point follow the last line contained in the description, reversing it, and going from the place of beginning south to the point on the line between Portage Township and Cuyahoga Falls Township, 100 feet by such line, and we have a point definitely fixed at which the line next preceding the last line of the description ends. We now have both the point of beginning and ending of this one line, which, it is said, is so indefinitely described as to make the description defective in failing to conform to that required by the statute, to wit: a "specific description."

This contention we hold is not sound. The line which is to end at the point 100 feet from the beginning point, measured southerly along the line between Portage Township and Cuyahoga Falls Township, and which is to begin at a monument, to wit: the iron pin already mentioned in Sill's line, is to be along the south bank of the Cuyahoga River, following the meandering of the center line of such river and approximately 100 feet therefrom.

It is this word "approximately" that is said to make the description indefinite, but when we know the termini of this line, and that its course is to follow the meanderings of the center line of the river, it seems that a surveyor would be able to fix the line. Definitions of the word "approximate" are given to us in brief of counsel, but its meaning is generally understood by people who are familiar with the English language. As here used, it means "about," "near to." The propriety of using this word in this description seems manifest from the fact that though the terminus of the line at one end is just 100 feet, from the center of the river,

its other terminus may be more or less than that. The description does not advise us, but it is a fixed point, and is at some certain distance from the center line of this river. The line between these termini, if it follows the meanderings of the center line of the river, would be just 100 feet from the center line of the river during its whole course, if its beginning point were just 100 feet from such center line. The description does not show whether this beginning point is just 100 feet, or more or less than 100 feet, from that center line, but it does show that that line is to follow following the meanderings of the center line of the river, and that, of course, means following them regularly, making the turns that the center line of the river makes wherever such turns are made, and that it is to end at a fixed point just 100 feet from the center line of the river. This would seem to us to be as "specific" as it could well be made.

Entertaining this view, it follows that the judgment of the probate court dismissing the petition on the ground that the description was not "specific" under the statute, and the judgment of the court of common pleas affirming such judgment, must be reversed, and the cause remanded to the probate court for further proceedings.

This reversal is not based upon any error other than that already pointed out. We think the court was right in holding that if there were such defect in the description given in the petition as that it failed to meet the requirements of the statute, such failure could not be corrected by amendment.

Messrs. D. C. Westenhaver and Willis Bacon,
Counsel for Plaintiff in Error.

Messrs. Rogers & Rowley,
Counsel for Defendant in Error.

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JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1916

No. 342

THE CUYAHOGA RIVER POWER COMPANY,
Plaintiff-in-Error

against

THE NORTHERN REALTY COMPANY AND THE NORTHERN OHIO TRACTION & LIGHT COMPANY,
Defendants-in-Error.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

BRIEF FOR PLAINTIFF-IN-ERROR
In Opposition to Motion to Dismiss or Affirm.

WILLIAM Z. DAVIS, Columbus, O.
JOHN L. WELLS,
CARROLL G. WALTER, } New York.
Counsel for Plaintiff-in-Error.

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Supreme Court of the United States,

OCTOBER TERM—1916.

THE CUYAHOGA RIVER POWER COMPANY,
Plaintiff-in-Error,

against

THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION AND LIGHT COMPANY,
Defendants-in-Error.

No. 342.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

BRIEF FOR PLAINTIFF-IN-ERROR

In Opposition to Motion to Dismiss or Affirm.

(The plaintiff-in-error has already filed its brief upon the whole case. We respectfully ask that that brief be read in opposition to this motion in connection with this brief)

This writ of error was allowed by Mr. Justice PITNEY on September 9, 1915. The case was docketed by the plaintiff-in-error on January 8, 1916. The printing of the record was completed in December, 1916; and in February, 1917, the plaintiff-

in-error served and filed a 125-page brief in support of its contentions.

Now, practically on the eve of the time for oral argument, the defendants-in-error submit this motion (*a*) to dismiss the writ of error for want of jurisdiction, or (*b*) to affirm the judgment upon the ground that it is manifestly correct.

The propositions advanced in support of the motion to dismiss are:

1.—The writ of error should have been directed to the Supreme Court of Ohio instead of to the Court of Appeals.

2.—The alleged Federal questions did not control the decision of the state court.

3.—No Federal question is involved in the case.

The brief submitted in support of the motion is confined to these propositions—no attempt being made to support the motion to affirm except as it may be involved in the last-stated ground of the motion to dismiss.

We will answer these three propositions in turn, except that we reverse the order of the second and third so as to avoid unnecessary repetition by showing the existence of Federal questions before undertaking to show that the Federal questions control the decision of the case.

I.

Repeated decisions of this Court conclusively establish that the writ of error was properly directed to the Court of Appeals.

This case was originally tried in the Court of Common Pleas of Summit County. Its judgment was reviewed and affirmed by the Court of Appeals to which this writ of error is directed.

After this affirmance the plaintiff moved the Supreme Court of Ohio "for an order requiring the Court of Appeals of Summit County to certify its record in said case to (said Supreme) Court for review" (Record, pp. 312-314). It also filed in the Supreme Court a "petition in error," wherein it prayed "that said judgment may be reversed" and that the plaintiff "may be restored to all things it has lost by reason thereof" (Record, pp. 315, 316). The defendants thereupon moved the Supreme Court to dismiss the petition in error *upon the ground that the judgment of the Court of Appeals was final and that the Supreme Court had no jurisdiction* (Record, pp. 317, 318). The two motions were heard together, and upon consideration thereof the Supreme Court found that it was "WITHOUT JURISDICTION IN THE PREMISES" and accordingly sustained the defendants' motion to dismiss the petition in error and overruled the plaintiff's motion to direct the Court of Appeals to certify the record (Record, pp. 319, 320).

It would seem that no amount of argument could either clarify or obscure the obvious fact that the Supreme Court of Ohio *did not exercise*

any jurisdiction in the case and did not review or affirm the judgment. Its order expressly states that it is *without jurisdiction.* And under the rule announced in *Norfolk Turnpike Co.* v. *Virginia,* 225 U. S., 264, 269—which announcement was expressly stated to be *"for the guidance of suitors in the future"*—it is very clear that it would have been improper and ineffective for the plaintiff to attempt to bring the case to this court by means of a writ of error directed to the Supreme Court of Ohio. The rule stated by Mr. Chief Justice WHITE in the case just cited was as follows:

> "While, therefore, in this case, for the reasons stated, we entertain jurisdiction and do not of our own motion dismiss the writ, for the purpose of avoiding the complexity and doubt which must continue to recur and for the guidance of suitors in the future we now state that, from and after the opening of the next term of this court, where a writ of error is prosecuted to an alleged judgment or a decree of a court of last resort of a State declining to allow a writ of error to or an appeal from a lower state court, unless it plainly appears, on the face of the record, by *an affirmance in express terms* of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was *the exercise by it of jurisdiction to review the case upon the merits,* we shall consider ourselves constrained to apply the rule announced in the *Crovo Case.*"*

*Western Union Telegraph Co. v. Crovo, 220 U. S., 364, 366, where it is laid down that, where the Supreme Court of the State refuses a writ of error, the court below is the highest court of the State to which the case can be carried and the writ of error is properly directed to that court, even though the State Supreme Court refuse the writ upon the ground that the judgment is plainly right.

It necessarily follows that the writ in the case at bar was properly directed to the Court of Appeals rather than to the Supreme Court, because the record of the proceedings had in that court do not show "an affirmance in express terms of the judgment or decree sought to be reviewed," and the action taken by the Supreme Court was not "the exercise by it of jurisdiction to review the case upon the merits." The defendants, indeed, admit this at page 6 of their brief, where it is said:

> "We appreciate that the Supreme Court of Ohio *did not affirm in express terms the judgment of the Court of Appeals,* and also that the Supreme Court *did not exercise its jurisdiction to review the entire case upon the merits.*"

The defendants contend, however, that this case does not come within the rule stated in *Norfolk Turnpike Co.* v. *Virginia, supra,* because in this case the Supreme Court of Ohio "did not decline to allow a writ of error to the Court of Appeals" (Brief, p. 6). They assert that "the Supreme Court had no discretion in that regard," and that the petition in error was filed *as a matter of right* (Brief, p. 5). Upon the basis of these assertions, they insist that despite the explicit language of the order of the Supreme Court of Ohio to the effect that it was "without jurisdiction in the premises," the Supreme Court of Ohio actually did take jurisdiction and determine "the very question which this court must decide" (Brief, p. 8).

The groundlessness of this argument is demonstrated by the decision in *Western Union Tel. Co.*

v. *Hughes,* 203 U. S., 505. In that case the Supreme Court of Appeals of Virginia *did not decline to allow a writ of error,* but, on the contrary, did allow the writ and hear argument of the case and write an opinion. Yet it was held by this court that, inasmuch as the State Supreme Court subsequently *dismissed* the writ of error, the proper method by which to bring the case here was by means of a writ of error to the inferior State Court rather than to the Supreme Court of Appeals.

The defendants seek to distinguish that case upon the ground that the Supreme Court of Appeals dismissed the writ upon the ground that it was "improvidently awarded," which, say the defendants, "naturally implied that the court had jurisdiction to entertain the writ or not in its discretion" (Brief, p. 7). The fact was, however, that the Virginia court thought the writ was "improvidently awarded" *because it was without jurisdiction* (203 U. S., 506).

Certainly the filing of the plaintiff's "petition in error" in the Ohio Supreme Court in the case at bar had no greater or different effect than the Virginia court's allowance of a writ of error in the *Hughes case;* and inasmuch as the Ohio Supreme Court subsequently dismissed the petition in error *pursuant to the granting of the defendants' motion to dismiss it upon the ground that the court was without jurisdiction,* it necessarily follows, under the doctrine laid down by this court in the *Hughes case,* that the proper method by which to bring the case here is by writ of error to the Court of Appeals, just as the plaintiff here has done.

It was argued in the *Hughes case,* just as it is

argued here, that the Virginia court's order of dismissal was a "final judgment"; but this contention was rejected. In so holding, Mr. Chief Justice WHITE said:

> "Treating the order of dismissal as a final judgment, we are now asked on this writ of error to reverse the ruling of the Supreme Court of Appeals of Virginia. This, however, we cannot do. *It is immaterial that the Supreme Court of Appeals was vested by the State Constitution with appellate jurisdiction in all cases involving the constitutionality of a law as being repugnant to the constitution of Virginia or of the United States, or that in the opinion delivered by the court it discussed the Federal question and declared it to be without merit.* The fact is undoubted that the writ of error was dismissed solely and expressly because of a want of jurisdiction, and the effect of the formal entry, adjudging that the court was without jurisdiction to pass upon the questions presented by the writ of error, cannot be different from what it would have been had the court not given expression to its views in a written opinion. The necessary result of the ruling that the court had not jurisdiction of the writ of error was to determine that the trial court was the final court where the questions presented by the writ could be decided; and, hence, the writ of error should have been directed to that court. *Missouri, K. & T. Ry.* v. *Elliott,* 184 U. S., 530, 539."

The defendants' argument is, furthermore, entirely foreclosed by other recent decisions of this court upon this precise question:

(1) *Stratton* v. *Stratton*, 239 U. S., 55;

(2) *Valley Steamship Co.* v. *Wattawa*, 241 U. S., 642;

(3) *Second Natl. Bank* v. *First Natl. Bank*, 242 U. S., 600;

(4) *Cleveland, &c., Ry. Co.* v. *Dettlebach*, 239 U. S., 588.

Each of these cases involved a consideration of the correct practice with respect to writs of error from this court to the courts of Ohio.

In (1) a writ of error to the Court of Appeals had been obtained *without first invoking what this court designated as the "gracious or discretionary" power of the Supreme Court to review the judgment*, and the writ was dismissed because of this failure to attempt to obtain a review of the case by the Supreme Court.

In (2) the writ of error was directed *to the Supreme Court of Ohio* and was dismissed by this court for want of jurisdiction

> "upon the authority of *Western Union Telegraph Co.* v. *Crovo*, 220 U. S., 364, 366, *Norfolk Turnpike Co.* v. *Virginia*, 225 U. S., 264, 268, 269, *Stratton* v. *Stratton*, 239 U. S., 55."

In (3) the writ of error was directed to *the trial court* after there had been an affirmance of the judgment by the Court of Appeals and a refusal by the Supreme Court "to direct the Court of Appeals to certify its record to the Supreme Court for review;" and the writ was dismissed *because this court was of the opinion that "the writ of error should have been directed to the Court of Appeals, as that, under the Constitution*

and laws of the State of Ohio, is the highest court in which a final judgment could be rendered in this case in view of the refusal of the Supreme Court of Ohio to grant the motion to certify to it the record of the Court of Appeals."

In (4), *as in the case at bar,* the writ of error was directed to the Court of Appeals after the Supreme Court had declined to review the judgment, *and the writ was sustained by this court and the judgment reversed.*

It thus appears that since the remodeling of the judiciary of Ohio by the Constitution of 1912 every possible method of getting a case from the State court to this court has been tried by different attorneys, *and the only practice which has been sustained is the practice adopted by the plaintiff-in-error in this case.* This court has successively dismissed writs of error directed to the Supreme Court of the State, to the trial court, and to the Court of Appeals where no attempt had been made to get the Supreme Court to review the judgment. On the other hand, in a case in which the writ was directed to the Court of Appeals after the Supreme Court had declined to review the judgment, this court took jurisdiction and reversed the judgment (*Dettlebach case, supra*), and in another case this court has expressly stated that, where the Supreme Court refuses to grant a motion to require the Court of Appeals to certify the record to it, the Court of Appeals "is the highest court in which a final judgment could be rendered" and that the writ of error should be directed to that court (*Second Natl. Bank* v. *First Natl. Bank, supra*).

Moreover, an examination of the records in the *Dettlebach* and *Wattawa* cases discloses that in

each of them the procedure with reference to getting the case before the Ohio Supreme Court was identical with the procedure adopted in the case at bar, *i. e.*, in each of those cases the plaintiffs moved the Supreme Court to direct the Court of Appeals to certify its record to the Supreme Court *and also filed a petition in error in the Supreme Court setting up constitutional questions.* In each of those cases, too, the State Supreme Court *dismissed the petition in error* and overruled the motion to certify the record, just as it did in the case at bar. The cases are, therefore, directly in point and controlling here. It may be observed, also, that in the *Wattawa case*, an elaborate brief was filed in support of the view that the writ of error from this court was properly directed to the Supreme Court of Ohio because that court had "no discretion" with respect to exercising jurisdiction in cases involving constitutional questions and the petition in error had been filed in the State Supreme Court *as a matter of right*, and that the dismissal of the petition thus involved an exercise of jurisdiction. The argument advanced was substantially the same as that now advanced by the defendants in this case. Yet, as we have seen, this court dismissed the writ of error for want of jurisdiction.

Thus, the attempt to distinguish the case from *Western Union Tel. Co.* v. *Crovo* and *Norfolk Turnpike Co.* v. *Virginia*, *supra*, has been already made and rejected by this court.

The defendants refer to *Missouri K. & T. Ry.* v. *Elliott*, 184 U. S., 530, and attempt to escape its force by saying that the ruling in that case to the effect that the writ was properly directed to the Kansas City Court of Appeals, instead of

to the Supreme Court of Missouri, "was based upon the peculiar language of the Missouri Constitution." But a reading of the case will disclose a substantial identity, and the opinion by Mr. Chief Justice WHITE in that case completely demonstrates that the Ohio Supreme Court's dismissal of the petition in error in the case at bar was not the exercise of jurisdiction, but merely a finding that it did not have jurisdiction (pp. 535-539).

Incidentally, that case shows, also, that even though the Ohio Supreme Court's refusal to take jurisdiction were based upon its opinion that no constitutional question was involved in this case, such refusal would be in no way controlling upon this court, either with respect to jurisdiction or with respect to the merits of the case; for in the case last cited this court took jurisdiction of a writ of error to the Kansas City Court of Appeals and reversed the judgment despite the Missouri Supreme Court's holding that the case involved no Federal questions. The same thing is shown by the above quotation from the *Hughes case;* and to the same effect is *Wabash R. R. Co.* v. *Pearce,* 192 U. S., 179, where the State Supreme Court refused to take jurisdiction because it was of the opinion that no Federal question was involved and, despite that fact, this court took jurisdiction and reversed the judgment of the inferior State Court which the State Supreme Court had declined to review.

Finally, there is still another conclusive reason why the writ of error in this case could not be directed to the Ohio Supreme Court. THE RECORD OF THE CASE WAS NOT THERE; and a writ directed

to that court would thus have been a vain and futile thing. It is a long-established rule that the writ must be sent to the court which has the record; and this is the proper practice even where the highest court of the State has actually taken jurisdiction of the case and decided it upon its merits.

Sioux Remedy Co. v. *Cope,* 235 U. S., 197, 200;
Shanks v. *D. L. & W. R. R.,* 239 U. S., 556.

See, also, the following cases, which are but a few of the many cases in which, in accordance with this rule, the writ was directed to an inferior State court, although the highest State court had passed upon the case:

Keeney v. *New York,* 222 U. S., 525;
Erie R. R. v. *New York,* 233 U. S., 671;
Erie R. R. v. *Williams, id.,* 285;
Cornell Steamboat Co. v. *Phoenix Const. Co., id.,* 593;
Interborough Rapid Transit Co. v. *Sohmer,* 237 U. S., 276;
Knapp v. *Alexander Co., id.,* 162.

It is perfectly plain, we submit, that this branch of the motion is clearly untenable and *could not be sustained without overturning a long line of decisions of this court, upon which the plaintiff relied and was clearly justified in relying.*

II.

The case clearly involves Federal questions of a grave and substantial character.

The defendants explicitly state that they "assume that the plaintiff is right in its contention that under its charter, followed by the adoption of its plan of development, it acquired *a contract or property right in the lands located in the valley of the Cuyahoga River needed for its development purposes*" (Brief, p. 19). And in no place throughout the brief do they contend that the plaintiff has not been deprived of that contract and property right in this case. On the contrary, the defendants recognize the fact that "the contract which plaintiff claims has been impaired and its property of which it claims it has been deprived without due process of law are its alleged *right to condemn the defendants' land for its development purposes*" (Brief, p. 22); and there is, of course, no question but that this *right to condemn* has been denied. That is undisputed.

The admitted situation, then, is this: The plaintiff claims, and upon this motion is assumed to have, a contract and property right to condemn the defendants' land, and concededly it has been denied and deprived of that right.

The case thus clearly involves the questions (1) whether the denial of that contract and property right constitutes a deprivation of property without due process of law, and (2) whether the denial involves an unconstitutional impairment of the contract.

With respect to the claim that the plaintiff's

contract has been impaired, the defendants' contention is that jurisdiction to determine that claim does not exist because the impairment "is not the result of any *legislative* action" (Brief, p. 20). To substantiate that contention they assert that their defense that "the property which plaintiff was endeavoring to condemn had already been devoted to a public use does not involve the assertion of the right of eminent domain, but even if it did, nothing is presented in the nature of a legislative act subsequent to the creation of plaintiff's alleged contract" (Brief, p. 20). The assertion, however, is purely *dogmatic*. No attempt is made to answer the argument upon that question which is presented in Point V of the brief already filed herein on behalf of the plaintiff. Without repeating that argument here, we beg to refer the court to that portion of our brief—calling particular attention to the cases showing that a "legislative act" within the meaning of the contract clause of the Federal Constitution may consist of "any exertion of the legislative power of the State" and to the other cases showing that a devotion of property to a public use is an exertion of such legislative power. We also direct attention to Point VI of our brief, in which it is shown that in rendering its judgment the State court necessarily gave effect to the Ohio Public Service Commission Act, which was passed subsequent to the time the plaintiff obtained its contract. *The defendants make no attempt whatever to controvert that proposition.*

With respect to the question of due process of law, the plaintiff claims that due process is lacking for several reasons, viz., its property has been taken: (a) without compensation, (b) for a private use, (c) not in the regular course of legal pro-

ceedings and without an opportunity to be heard, (d) not pursuant to any law authorizing the taking. (See Points III and IV of our brief already filed herein, to which we respectfully direct the court's attention.)

The defendants, upon this motion, make *no answer to propositions* (*b*) *and* (*d*). Indeed, they baldly assert that these are *not Federal questions* (see page 26 of their brief, where, after enumerating the questions discussed in our brief, including the contentions as to private use and the necessity for the existence of a law authorizing a taking of property for a public use, they state that "there is not a Federal question in the list"). But if anything be settled it is that the question as to the character of the use for which property is taken is essentially Federal (see cases cited on pages 55 and 56 of our brief); and this court has expressly recognized that "a law authorizing it" is essential to due process in the taking of property for a public use (*Cincinnati* v. *Louisville & Nashville R. R. Co.*, 223 U. S., 390, 400, cited at pages 72, 73 of our brief). It is manifest, therefore, that the defendants' contention that no Federal question is involved, proceeds upon a very erroneous notion as to what constitutes a Federal question.

In answer to proposition (c), to wit, the claim that the plaintiff's property has been taken not in the course of legal proceedings and without an opportunity to be heard, the defendants say that, inasmuch as the plaintiff itself instituted the proceeding in which the judgment was rendered, and inasmuch as the court admittedly had jurisdiction to hear and determine the issues, the proposition resolves itself into the mere claim that the State Court's decision is erroneous. This assertion evinces a misconception of the basis of our con-

tention upon this point. Our contention that the plaintiff's property has been taken from it without an opportunity to be heard has no reference whatever to any finding the State Court may have made with respect to the issues involved in the proceeding instituted by the plaintiff. The ground of the contention is that the necessary operation of the judgment is to *go beyond the issues presented in that proceeding* and, in effect, permit The Northern Ohio Power Company, which was not a party to the proceeding, to take the plaintiff's property (*i.e.*, deprive it of its right to acquire the defendants' land) by acts *in pais, without requiring said Northern Ohio Power Company to prove its corporate existence and right to appropriate property for a public use.** The "ab-

*In this connection we call particular attention to pages 77 and 78 of the brief already filed herein on behalf of the plaintiff, where it is pointed out that, if the plaintiff's right to acquire the land be a property right to which the land was subject or subservient, no one could obtain a full title to the land or a right to use it for any purpose inconsistent with the plaintiff's use **without acquiring this right of the plaintiff and paying just compensation therefor**; and as the judgment under review, in consequence of its having sustained the claim of a devotion of the property to a public use by The Northern Ohio Power Company, has the effect of giving to the defendants a full title and right of exclusive use, free of any claim of the plaintiff, the judgment obviously has all the effect of a judgment in an appropriation proceeding brought **against** the plaintiff. In other words, although the proceeding was instituted by the plaintiff for the purpose of appropriating property to its own use, the result of the judgment is to permit The Northern Ohio Power Company, without any hearing or trial, to appropriate the plaintiff's property to the defendants' use.

It is important to note, also, that the Ohio statutes clearly recognize that it frequently may happen that an appropriation of something other than merely physical objects is essential. Thus, in Section 11042, which relates to the petition to be filed in appropriation proceedings, it is provided that the petition shall describe "each parcel of property, **interest**, or **RIGHT**, within the county, sought to be appropriated." Obviously, therefore, even though the plaintiff had no title to the soil it was yet incumbent upon The Northern Ohio Power Company to appropriate, by a formal proceeding in court, the plaintiff's "**right**" to acquire the land, before it could become constitutionally entitled to hold the land free of this right of the plaintiff; and in such proceeding it would have been necessary for The Northern Ohio Power Company to establish by proof its own corporate existence and its own "right to appropriate" property for a public use.

sence of legal proceedings" of which we complain is the absence of any proceeding by The Northern Ohio Power Company to acquire the plaintiff's property; and the lack of "notice and opportunity to be heard" of which we complain is the lack of any notice of the taking by The Northern Ohio Power Company and the lack of any opportunity to be heard upon the questions of the corporate existence *of that company* and *its* right to make the appropriation.

The defendants cite the case of *Macdonald* v. *Oregon R. & N. Co.*, 233 U. S., 665, as supporting their contention, but in that case both parties had full and ample opportunity to be heard upon all questions respecting their rights, and the only complaint was that the State court had afforded to one of the parties a more extensive measure of relief than the other thought was justified by the evidence. The case is not pertinent. The case which fits the situation here disclosed is *Stewart* v. *Michigan*, 232 U. S., 665. In that case Stewart was convicted of peddling without having obtained a license. Upon the argument in this court it was conceded that the judgment was erroneous in so far as it held that there could be a conviction because of sales made in the course of interstate commerce, but it was sought to sustain the judgment because the State Supreme Court had found that "there was evidence showing some sales made from the car or storeroom not under previous orders, and as the latter sales were not within the shelter of the commerce clause, therefore the affirmance on that ground was an independent non-Federal conclusion sustaining the action of the court and calling for the duty of af-

firmance." Mr. Chief Justice WHITE answered that contention as follows:

> "But this proposition disregards the fact that the only charge made against the accused was for peddling and that the instructions of the court and the whole course of the trial conclusively established that the sales made from the car, as the result of the orders solicited, formed the sole basis for the prosecution, and the conviction therefore related to that and to that alone. If then it be admitted that the judgment below was placed upon two grounds, such admission would not establish that the judgment rested upon an independent state ground adequate to sustain it, since the first ground it is admitted was Federal and erroneous, *and the second ground if upheld would amount to a condemnation without hearing and therefore constitute a denial of due process of law.*"

Of course it cannot be denied that "condemnation without hearing" is a denial of due process of law in civil cases as well as in criminal cases; and, paraphrasing the language just quoted, we insist that the questions as to the corporate existence of The Northern Ohio Power Company and its right to appropriate property for a public use were not within the issues legally presented by the proceeding instituted by the plaintiff, and that, in treating that so-called corporation as a real entity having power to appropriate property to a public use and giving effect to its alleged devotion of the land to a public use, the State Court has rendered judgment upon matters not within the issues and thus upheld "a condemnation without hearing"

and therefore denied due process of law to the plaintiff. The situation is precisely the same, in its constitutional aspect, as if a person had been tried and convicted for an offense not charged in the indictment. (See, also, Point IV of brief heretofore filed herein on behalf of the plaintiff.)

In answer to proposition (a), to wit, the claim that the plaintiff's property has been taken without compensation, the defendants admit that, under the rule stated in *Chicago, B. & Q. R. R. Co.* v. *Chicago,* 166 U. S., 226, the payment of compensation for property taken for a public use is an essential element of due process of law, but seek to distinguish that case as follows (Brief, p. 23):

> "This authority might be in point if the defendants were condemning the plaintiff's property and secured a judgment in their favor without the award of any compensation to plaintiff for the property taken. This is not that kind of a case. The court denied the plaintiff's right to condemn the defendants' property. *It did not grant the defendants the right to condemn plaintiff's property without compensation.*"

Of course the defendants were not, actively and in form, seeking a condemnation of the plaintiff's property, but, as already pointed out, the necessary effect of the judgment is to accord them that relief, because, by virtue of the judgment, they have become entitled to hold the land free of any claim of the plaintiff and free of any obligation to compensate it for the rights of which it has been deprived. In other words, the defendants have obtained all the relief which they could obtain if they had instituted a condemnation proceeding

against the plaintiff and consequently the State court did, in effect, "grant the defendants the right to condemn plaintiffs' property without compensation."

It is hardly necessary to add that the constitutional provision that private property cannot be taken for a public use except upon the payment of just compensation is not confined to cases where the party seeking to take the property actually goes into court and seeks a judgment of condemnation. It is equally applicable to those cases in which the taking is sought to be accomplished without a formal appropriation proceeding. Indeed, the instances are exceedingly rare in which it is necessary to invoke the constitutional guaranty in cases where there is a condemnation proceeding pending, for in the cases where a party seeking to take property for a public use voluntarily commences an appropriation proceeding there is generally no attempt to escape the obligation of making just compensation. It is in those cases in which, as here, the taking is "*disguised in an ambiguous form*" and is sought to be accomplished without a condemnation proceeding that the constitutional guaranty becomes of real importance. If it afforded protection only in the cases in which its obligation is recognized and admitted it would be of little efficacy.

The defendants make this further contention (Brief, p. 24):

> "There is no doubt that the State had authority to authorize the court to deny the right to condemn to any party where the property which said party proposes to condemn has *already* been devoted to public use. As a matter of fact this is a general principle

> of law and if it be true, as alleged by the plaintiff, that the state court acted upon it in this case, it does not follow that a Federal question is presented. On the contrary plaintiff's position resolves itself into nothing more than a charge that the decision of the State Court was erroneous."

They attempt to fortify the contention by the citation of cases illustrating the general rule that "whether the State *could,* not whether the State *did,* authorize the procedure followed, is ordinarily the only question open for consideration by the Federal courts upon a writ of error." We do not dispute this general rule. The fallacy underlying the defendants' attempt to apply it in this case is their naïve omission to state that the question in this case is not whether the State could deny the right to condemn where the property "has *already* been devoted to public use," but whether an *existing* right to condemn can be defeated by a *subsequent* devotion of the property to a public use (see pp. 93-95 of Brief already filed herein on behalf of the plaintiff). We submit that there can be no doubt that no State has authority to authorize or permit any court to defeat an existing right to condemn, duly granted to a corporation by the State, by giving effect to a devotion of the property to a public use subsequently consummated by another corporation (see Point V of our brief).

With reference to the enumeration of the questions discussed in our brief, which will be found at pages 25 and 26 of the defendants' brief, we have already called attention to the fact that the questions numbered *2* and *3* are essentially Federal (*ante,* p. 15). The question numbered *4*

is a part of our contention that the defendants' alleged devotion of the land to a public use, as given effect by the State court, is a subsequent exertion of legislative power which impairs the obligation of the plaintiff's contract, and certainly there can be no doubt that this is a question which it is within the jurisdiction of this court to determine. The questions numbered *5, 6* and *7* are separate elements of our contention that the plaintiff's contract, when properly construed, gives it a vested right to acquire the land in question despite the defendants' present use of it, and of course there is no doubt that the construction of the contract is a question which it is the pre-eminent function of this court to decide (see cases cited at p. 99 of our brief).

We repeat, therefore, that the defendants' bald assertion that "there is not a Federal question in the list" is but an emphatic illustration of the fact that their entire motion proceeds upon a misconception of what a Federal question really is.

Another point to which we wish to direct the very serious consideration of the court is the fact that throughout their entire brief—even when they undertake to enumerate the questions discussed in the plaintiff's brief—*the defendants completely ignore the point that in rendering its decision the State court necessarily gave effect to the Ohio Public Service Commission Act of June 30, 1911.* That point stands admitted upon this motion; for how else can one account for the defendants' failure to refer to it?

III.

The Federal questions control the case, because the necessary effect of the judgment is to deny the asserted Federal right, and the judgment does not rest upon any independent non-Federal ground broad enough to sustain it.

(At this point we request the Court to read pages 20 to 23 of Brief already submitted by us.)

We freely concede the well-settled rule that where a State judgment rests upon an independent non-Federal ground that is sufficient in itself to sustain the judgment, this court will not take jurisdiction even though Federal questions were decided and decided erroneously.

But we emphatically dissent from the theory (which, upon analysis, will be found to form the sole basis of the defendants' argument upon this branch of the motion) that the mere presence of local, non-Federal questions in a case is sufficient to defeat jurisdiction.

In the first place:

In order for the non-Federal question to constitute an "independent" ground sufficient to sustain the judgment, it must be "one which does not necessarily include a determination of the Federal right claimed" (*Giles* v. *Teasley*, 193 U. S., 146, 160, per Mr. Justice DAY); and this court very recently has announced that

> "Where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment *without any decision*

of the other, (*i e.,* the Federal question), our jurisdiction is plain."

Enterprise Irrigation District v. *Farmers' Mut. Canal Co.,* per Mr. Justice VAN DEVANTER, decided March 6, 1917, not yet reported.

If the necessary effect of the judgment is to deny a Federal right or immunity specially set up and claimed, which, if recognized and enforced, would require a different judgment, then this court has jurisdiction and will review the judgment.

Chicago, B. & Q. Ry. v. *Drainage Commissioners,* 200 U. S., 561, 580, 581;
West Chicago R. R. v. *Chicago,* 201 U. S., 506, 519, 520;
Ferris v. *Frohman,* 223 U. S., 424, 431.

And this is true, not only where local questions are merely "in the case," but, also, *where the State court has expressly and in terms based its decision upon the local questions.*

Cases cited, supra.

For State courts cannot accomplish the denial of Federal rights "merely by silence on the Federal question and by placing the judgment on some principle of the common law."

Chicago, B. & Q. Ry. v. *Drainage Com., supra,* at p. 581.

They cannot, by any method, evade the Federal question if it be necessary to a decision; and "of such necessity this court must in each instance decide."

Wood v. *Cheseborough,* 228 U. S., 672, 677, 678, per Mr. Justice MCKENNA.

In *Ferris* v. *Frohman, Chicago, B. & Q. Ry.* v. *Drainage Comm.*, and *West Chicago R. R.* v. *Chicago, supra*, the State courts expressly rested their judgments upon local and non-Federal grounds, and yet this court took jurisdiction in each instance because the necessary effect of the judgment was to deny the asserted Federal right.

Another illustration of this doctrine is *Anderson* v. *Carkins*, 135 U. S., 483. That was a bill for specific performance of a contract which was defended upon the ground that the contract was void under the homestead laws of the United States. The State court decided the case upon *questions of local law* and gave a decree for specific performance. This court held that the necessary effect of this decree was to overrule the defense grounded upon a Federal law and thus, in effect, deny the asserted Federal right. It accordingly took jurisdiction.

This court, therefore, must decide whether, in this case, there is any local or non-Federal question that is not so interwoven with the Federal question as to include a determination of the latter, or, in other words, whether the judgment could have been rendered without denying the asserted Federal right.

In the second place:

Even if the non-Federal question be independent of and not interwoven with the Federal question, its mere presence in the case is not sufficient to show that the judgment rests upon it.

Where an opinion has been delivered the general practice of this court is to look to the opinion to determine the grounds of the decision, and if the opinion actually place the decision upon a

non-Federal ground this court will ordinarily go no further than to ascertain whether such non-Federal ground has fair support in the record, but even in such cases it is recognized that if the non-Federal ground be so certainly unfounded that it properly may be regarded as essentially arbitrary, this court will not allow its jurisdiction to be defeated.

> *Enterprise Irrigation District* v. *Farmers' Mutual Canal Co.*, per Mr. Justice VAN DEVANTER, decided March 6, 1917, not yet reported;
> *Leathe* v. *Thomas*, 207 U. S., 93, 99, per Mr. Justice HOLMES;
> *Garr Scott & Co.* v. *Shannon*, 223 U. S., 468, 471, 473, per Mr. Justice LAMAR.

AND WHERE, AS IN THIS CASE, NO OPINION HAS BEEN DELIVERED, AND IT IS THUS IMPOSSIBLE TO KNOW THE PRECISE GROUND UPON WHICH THE STATE COURT ACTUALLY RESTED ITS JUDGMENT, THIS COURT WILL NOT DECLINE JURISDICTION UNLESS THE NON-FEDERAL GROUND IS A GOOD AND VALID ONE.

This rule was long ago established and never has been relaxed.

In *Neilson* v. *Lagow*, 12 How., 98, 110, it was contended that the court was without jurisdiction because the judgment might have been placed upon a non-Federal ground, and in answer to that contention this court said:

> "We cannot infer that the decision rested on this ground, *because we are of opinion it is not tenable.* If it had appeared affirma-

tively in the record that the Supreme Court did decide that the deed conveyed only a life estate, this court would not inquire into the correctness of that decision; but when put to infer what points may have been raised, and what that court did decide, we cannot infer that they decided wrong; otherwise, nothing would be necessary in any case to prevent this court from reversing an erroneous judgment under the twenty-fifth section of the Judiciary Act, but that counsel should raise on the record some point of local law, however erroneous, and suggest that the court below may have rested its judgment thereon."

The court then proceeded to discuss the correctness of the alleged non-Federal ground *with reference to general authorities,* and, reaching the conclusion that it was unsound, took jurisdiction and reversed the judgment.

In *Maguire* v. *Tyler,* 8 Wall., 650, 664, 665, in answer to an objection to the jurisdiction of the court to hear the case under the 25th section of the Judiciary Act, it was said:

"The respondents do not deny that there are issues in the pleadings involving questions re-examinable in this court under that section of the Judiciary Act; but what they contend is, that the answer presented other defences not re-examinable in this court, and they insist that the Supreme Court of the State, *for aught that appears to the contrary, may have decided the cause* against the plaintiff, and reversed the decree of the Court of Common Pleas *upon some of the defences set up in the answer which are not re-examinable in this court.* Certain it is that Federal

questions are directly involved in the pleadings, and if it appears that none of the other defences *afford any legal answer to the suit*, the conclusion must be that the case is properly here, as *this court will not presume that the court below decided the other issues erroneously in order to defeat their own jurisdiction.*"

In *Klinger* v. *Missouri*, 13 Wall., 257, 263, this court, through Mr. Justice BRADLEY, said:

> "The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground, *and it appears that the court did, in fact, base its judgment on such independent ground* and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one. *But where it does not appear on which of the two grounds the judgment was based*, then, *if the independent ground on which it might have been based* WAS A GOOD AND VALID ONE, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; *but if such independent ground was not a good and valid one, it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.*"

This statement was repeated and recognized as the law in *Eustis* v. *Bolles*, 150 U. S., 361, 366,

367; and in the recent case of *Adams* v. *Russell*, 229 U. S., 353, 358, which was a writ of error to review a judgment denying a petition for a writ of *habeas corpus*, this court, speaking through Mr. Justice McKenna, said:

> "The petition was denied without opinion and it is left indefinite upon what ground—whether the court entertained views adverse to plaintiff in error's on the Federal questions or whether it considered that its former decision determined his rights; whether, as a matter of procedure, a rehearing was his remedy, or whether the new claim of 'good time' allowance was tenable under the statute. In such situation may we conjecture upon which ground the court decided and by conjecture acquire jurisdiction to review the judgment of the court?
>
> "In *Eustis* v. *Bolles*, 150 U. S., 361, it is decided that when there is a Federal and state question in the case *and the latter is sufficient to sustain the judgment*, this court will not review the judgment, and the logical course is to dismiss the writ of error. But we may be put to infer what points may have been raised and what was decided; in other words, whether the state court rested its decision upon a Federal ground or upon an independent ground. IF THE LATTER BE CONTENDED, THEN IT MUST APPEAR THAT SUCH GROUND WAS A GOOD AND VALID ONE, sufficient to sustain the judgment. *Klinger* v. *Missouri*, 13 Wall., 257, 263. Otherwise, as was said in *Neilson* v. *Lagow*, 12 How., 98, 110, 'counsel might raise on the record some point of local law, however erroneous, and suggest that the court below may have rested its judgment thereon,' and, therefore, *if the*

> *independent ground be not good and valid it will not be presumed that the judgment was based upon it.* See also *Magwire* v. *Tyler,* 8 Wall., 650."

It was further said (p. 361):

> *"The sufficiency of the local question to sustain the judgment rendered,* and the necessity for the determination of the Federal question *necessarily we have to consider."*

In *Johnson* v. *Risk,* 137 U. S., 300, 307, the Court said, per Mr. Chief Justice FULLER:

> "Where there is a Federal question, but the case may have been disposed of on some other independent ground, and it does not appear on which of the two grounds the judgment was based, then *if the independent ground was not a good and valid one,* sufficient of itself to sustain the judgment, this court will take jurisdiction of the case, because, when put to inference as to what points the state court decided, *we ought not to assume that it proceeded on grounds clearly untenable."*

In that case the non-Federal question related to the proper interpretation and application of the Statnte of Limitations of Tennessee. The State court had delivered no opinion expressing the grounds of its judgment, and this court, in order to determine its jurisdiction, discussed at length the validity of the defense of the Statute of Limitations, not only with reference to prior decisions of the Supreme Court of Tennessee, but also, with reference to authorities in other jurisdictions. In other words, *the court investigated the*

validity of the alleged non-Federal ground of decision and reached its conclusion with respect to its own jurisdiction by determining whether or not the asserted non-Federal ground was "a good and valid one."

In *St. Louis & Iron Mountain Ry.* v. *McWhirter*, 229 U. S., 265, 276, the court seems to have gone even further in the direction of guarding against the defeat of its rightful jurisdiction by silence upon the part of the State courts with respect to the grounds upon which they rest their judgments. In that case it was said, per Mr. Chief Justice WHITE:

> "If as is inferable from the argument, reliance is placed on the ruling of the court below that there was evidence tending to show negligence on the part of the engineer for the purpose of establishing that even if a Federal question was passed upon the case was also decided on an independent non-Federal ground broad enough to sustain the judgment, the proposition is without merit. *The mere ruling that there was evidence sufficient to authorize consideration of the case from the point of view of negligence alone, affords no basis for saying that the case was decided on such ground. Mere conjecture may not be indulged in for the purpose of concluding that because there was a potentiality of considering the case from a non-Federal point of view, therefore it was considered and decided in that aspect.* But it was long since pointed out in *Neilson* v. *Lagow*, 12 How., 98, the court speaking through Mr. Justice CURTIS, that to admit that the authority to review the action of a state court where it has decided a Federal

> question can be rendered unavailing by a suggestion 'that the court below may have rested its judgment' on a non-Federal ground, would simply amount to depriving this court of all power to review Federal questions if only a party chose to make such a suggestion."

If the case last cited be followed, no conjecture can be indulged in and the jurisdiction of this court is beyond question. If the possibility of a decision upon a non-Federal ground be admitted, then the court must determine, not only whether or not there is a local, non-Federal question that is independent of the Federal question, but also, if there be one, then whether or not it is one upon which the judgment can rest, *i. e.*, whether or not it is a "good and valid" ground which would afford a "legal answer to the suit."

A.—There is no independent non-Federal question in the case.

The proceeding was instituted by the plaintiff for the sole purpose of acquiring a parcel of land needed for its enterprise; and the Federal right which it asserts is the *right to acquire* the land, *in invitum*, by an exercise of the power of eminent domain. That right is Federal in character because, as shown in Point II of the brief already filed and as conceded by the defendants upon this motion, it is secured by the plaintiff's charter-contract and is "property" within the meaning of the due process clause of the Federal Constitution.

The judgment under review unquestionably prevents the plaintiff from acquiring the land, and

thus denies the asserted Federal right whatever the process of reasoning by which the State court reached its conclusion. A recognition and enforcement of the asserted Federal right obviously would have produced a different judgment; and upon the authorities already cited we submit that the jurisdiction of this court is clear, regardless of whether the State court placed its decision upon some matter of local or general law or not. Paraphrasing some of the language of Mr. Justice HUGHES in *Ferris* v. *Frohman*, 223 U. S., 424, 431: By the judgment the plaintiff was permanently prevented from acquiring the land in controversy. The decision thus denied to it a Federal right specially set up and claimed under the contract and due process clauses of the United States Constitution. The fact that the court reached this conclusion in favor of the defendants by a consideration of common law principles or questions of local and general law to the exclusion of the Constitution does not alter the effect of the decision. This court, therefore, has jurisdiction.

The defendants insist that the case involved *four* questions, to wit, the plaintiff's corporate existence, its right to make the appropriation, its inability to agree as to the compensation to be paid, and the necessity for the appropriation. The plaintiff's corporate existence was fully proved and has not been challenged either here or in the State court; and the question of its right to make the appropriation is conceded to be Federal (Brief, p. 11). Thus, the so-called "purely local questions" upon which it is claimed the decision may have been based are the inability to

agree as to the compensation to be paid and the necessity for the appropriation (Brief, p. 12).*

Of course, we do not at all dispute that it was incumbent upon the plaintiff to establish its inability to agree as to the compensation to be paid and the necessity for the appropriation. But what is the reason why it was incumbent upon the plaintiff to establish those things? It is not sufficient to answer that the State statute required their proof. Why does the statute make that requirement? Obviously, the reason is that those things are "conditions precedent, prescribed by the legis-

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*The defendants state that there was an additional local question with respect to the sufficiency of the description of the property to be condemned (Brief, pp. 12, 13). That assertion, however, is inadvertent because obviously based upon a misconception of the record.

The question of the sufficiency of the description was specially raised by an oral motion to dismiss the petition, which motion the Probate Court granted (Rec., p. 1). That decision was reviewed in the Court of Common Pleas upon a separate petition in error (Rec., p. 11), and that Court affirmed the judgment of the Probate Court (Rec., p. 12). That judgment was in turn reviewed upon another petition in error filed in the old Circuit Court of Summit County (Rec., p. 13); and that court **reversed** the judgment of the Court of Common Pleas and remanded the cause for trial (Rec., p. 15). In rendering its decision the Circuit Court delivered an opinion (printed in full in the Appendix) from which we quote the following:

> "The only question presented, which, in our view of the case, requires our consideration, is whether the description in the petition of the land sought to be appropriated, is sufficient under the statute * * * We now have both the point of beginning and ending of this one line, which, it is said, is so indefinitely described as to make the description defective in failing to conform to that required by the statute, to wit: a 'specific description.'
>
> "This contention we hold is not sound. * * * This would seem to us to be as 'specific' as it could well be made.
>
> "Entertaining this view, it follows that the judgment of the Probate Court dismissing the petition on the ground that the description was not 'specific' under the statute, and the judgment of the Court of Common Pleas affirming such judgment, must be reversed, and the cause remanded to the Probate Court for further proceedings."

This judgment was in turn affirmed by the Supreme Court of Ohio (**Northern Realty Co. v. Cuyahoga River Power Co.**, 88 Ohio St., 616.)

It is thus apparent that the question as to the sufficiency of the description was conclusively and finally determined in favor of the plaintiff. It is impossible to claim that the adverse judgment now under review is or could be based upon that ground.

lature, to the right of eminent domain or to the exercise of such right" (*P. C. & T. R. R. Co.* v. *Tod,* 72 Ohio St., 156, 166, cited at p. 20 of our brief), and the existence of those conditions precedent must be shown *in order to establish that the plaintiff has the right to acquire the land.* In other words, those things must be shown IN ORDER TO ESTABLISH THE EXISTENCE OF THE IDENTICAL FEDERAL RIGHT WHICH THE PLAINTIFF HERE ASSERTS. Indeed, the power of eminent domain is founded upon and limited by the public *necessity* (*Giesy* v. *Cincinnati, W. & Z. R. R.,* 4 Ohio St., 308, 324, 325), and the four "conditions precedent" enumerated in §11,046 of the Ohio General Code always existed and were necessary to be established even before there was any statute expressly requiring their proof (*Powers* v. *Railway Co.,* 33 Ohio St., 429, per DAY, *J.*).

Approaching the subject from a somewhat different angle, let us put the inquiry: What is there before the court for decision when a corporation presents a petition of the kind presented by the plaintiff in this case? What is the object of the so-called "preliminary hearing"? Obviously, the sole concern of the court is the single ultimate question whether or not the alleged corporation which comes into court seeking to acquire the land of another citizen is a duly constituted agent of the State—clothed by it with legal authority to take the land upon payment of compensation. If it be such, the court has no duty, power, or discretion, but to impanel a jury and assess the amount of the compensation to be paid. It cannot arbitrarily refuse to do this by the device of a finding that the conditions have not been complied with if the evidence really establish such compliance.

We submit that it is perfectly clear, therefore, that although the statute enumerate four preliminary questions, those four are, in reality, but separate elements of the one single ultimate question: *Has the corporation a right to acquire the land?* As put by the defendants' own counsel in their brief in the Court of Common Pleas, the important issue is "the plaintiff's right to make the appropriation, *which really includes each and all the others.*"

And when the four "preliminary questions"—the conditions to the right to exercise the power of eminent domain—are established, what is the result? Clearly the result is that the right to acquire the land exists. In other words, when these conditions are established the existence of the asserted Federal right follows as a necessary consequence. *Proof of compliance with the conditions establishes the Federal right.*

It is thus impossible to say that any of these four conditions or "preliminary questions" is an independent non-Federal matter. They are, indeed, so interwoven with the Federal right that they *actually constitute it*, and a decision upon them cannot be reached without, in effect, deciding the Federal question itself, *i. e.*, without deciding as to the existence of the asserted Federal right.

Perhaps the defendants would answer that, conceding that proof of compliance with the "conditions precedent" establishes the Federal right and that in this sense the four "preliminary questions" are interwoven with and actually constitute the Federal question, yet the determination of whether those conditions have been complied with involves a consideration of questions of fact and

questions of local or general law, and if the State court found the facts and decided the questions of local or general law against the plaintiff this court could not take jurisdiction because it has no power to review a State court's determination upon these latter questions.

But this court, although repeatedly urged to do so, has steadfastly refused to permit the denial of Federal rights in any such manner. It is wholly immaterial whether the issues as to inability to agree and the necessity for the appropriation be regarded as questions of fact, questions of local or general law, or mixed questions of law and fact. For the settled rule is that *whatever is necessary to be determined in order to pass upon the asserted Federal right will be reviewed by this court, whether it be a question of Federal law, a question of local law, a principle of general jurisprudence, or even a contention that a finding of fact has been made without any evidence to support it.**

Thus, in *Carlson* v. *Curtiss*, 234 U. S., 103, 106, it was expressly stated by Mr. Justice PITNEY that a State court could not deprive a litigant of the benefit of a Federal right, either "by omitting to pass upon the basic questions of fact" or "by making findings that were wholly without support in the evidence;" and that if necessary for a decision of a Federal question this court will *examine the evidence*, not only "in order to determine whether there is evidence to support the findings of the State court," but, also, "*in order to determine what facts might reasonably be found*

*In this connection we direct attention to our Eighth Assignment of Error at page 330 of the Record, where it is distinctly set up that the judgment under review is indisputably contrary to the evidence and without any evidence to support it.

therefrom and which would furnish a basis for the asserted Federal right."

In *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S., 655, 668, it was pointed out by Mr. Justice HOLMES that findings "may depend upon questions that are re-examinable here," and that "the admissibility of evidence or *its sufficiency to warrant the conclusion reached* may be denied; or the conclusion may be a composite of fact and law, such as ownership or contract; or in some way the record may disclose that the finding necessarily involved a ruling within the appellate jurisdiction of this court." He further stated that "Such questions properly saved must be answered, and so far as it is necessary to examine the evidence in order to answer them or to prevent an evasion of real issues, the evidence will be examined."

In *Creswill* v. *Knights of Pythias*, 225 U. S., 246, 261, Mr. Chief Justice WHITE stated that "Where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support and the evidence is in the record the resulting question of law is open for decision." He stated, also, that "Where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to cause it to be essentially necessary for the purpose of passing upon the Federal question to analyze and dissect the facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right." And in that case the court did review the findings made by the State court concerning fraudulent purpose, injury to property, deception of the public, etc.

In *Kansas City Southern Ry.* v. *Albers Commission Co.*, 223 U. S., 573, 591, Mr. Justice VAN DEVANTER quoted an earlier case as recognizing the principle "where the question is of the competency and *legal effect of the evidence* as bearing upon a question of Federal law the decision may be reviewed by this court." He referred, also, to *Stanley* v. *Schwalby*, 162 U. S., 255, 274, 277-279 (in which this court reversed a judgment of the State court because upon examining the evidence this court was of the opinion that it was wholly insufficient to support the State court's conclusion that an attorney had *notice* of a previous deed) and quoted the following from the opinion of this court in that case:

> "But so far as the judgment of the state court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this court, WHETHER THAT QUESTION DEPENDS UPON THE CONSTITUTION, LAWS OR TREATIES OF THE UNITED STATES, OR UPON THE LOCAL LAW, OR UPON PRINCIPLES OF GENERAL JURISPRUDENCE."

In *Southern Pacific Co.* v. *Schuyler*, 227 U. S., 601, 611, this court affirmed its power and duty to review the finding of the State court with respect to the status of Schuyler as an interstate passenger—a question which was admitted to be a mixed question of law and fact—because this was necessary in order to determine the existence of the asserted Federal right.

In *Schlemmer* v. *Buffalo R. & P. Ry. Co.*, 205 U. S., 1, the State court had denied a right to recover under the Federal Safety Appliance Law

because it found that the deceased was guilty of *contributory negligence.* Yet this court took jurisdiction and re-examined the State court's finding upon that point and reversed the judgment.

In *Gauthier* v. *Morrison,* 232 U. S., 452, 458, the State court held that the asserted Federal right of the plaintiff to settle upon land and remain in possession thereof to the end that he might perform the acts essential to the acquisition of the title under the Homestead Law of the United States *did not exist* because, under its view of a survey of the land in question, the land was not subject to settlement. Yet this court took jurisdiction and reversed the judgment. The court said, per Mr. Justice VAN DEVANTER:

> "Although challenged by the defendants, our jurisdiction does not admit of any doubt. The plaintiff asserted a right to settle upon the land notwithstanding the wrongful act or error of the surveyor in designating and meandering it as a lake, and also a right to remain in possession to the end that he might perform the acts essential to the acquisition of the title, and he expressly predicated these rights upon the homestead law of the United States. The decision was against the rights so claimed, and this brings the case within §709 of the Revised Statutes, now §237 of the Judicial Code."

The analogy between that case and the case at bar is very striking. There, as here, the asserted Federal right consisted of a *right to acquire* title to a parcel of land. There, as here (as assumed by the defendants), the State court denied the right to acquire the land upon a ground which, if considered abstractly and dissociated from its relation to the ultimate Federal right claimed, in-

volved no decision upon a Federal question. Yet on account of the fact that a decision upon the underlying question necessarily controlled the ultimate question as to the existence of the asserted Federal right this court took jurisdiction. It follows that it must do so in the present case.

In *Bowe* v. *Scott*, 233 U. S., 658, 662, 663, the suit was brought to enjoin the enforcement of a municipal ordinance closing an alley. A motion to dismiss was made upon the ground that "as the court below rested its decision upon the *want of right* of the plaintiff to prevent the closing of the alley because such closing was in any event a public wrong which under the circumstances the complainants had no right to redress, the case below was decided upon a State ground which was independent of any assumed assertion of Federal right, and there is hence no jurisdiction." This ground of the motion was held to be untenable, the court saying, per Mr. Chief Justice WHITE:

> "The contention of the complainants was that they had such an interest in the property or were so peculiarly and especially damaged that they had a *right to prevent the closing of the alley* which could not be taken from them without depriving them of their Federal rights. This being true, as it undoubtedly is, it follows that the decision of the court below under the hypothesis stated, amounted to denial of the existence of the Federal rights which were adequately asserted. And from this it follows that the proposition now relied upon when rightly considered comes to this, that jurisdiction to enforce and protect a Federal right obtains in no case where such Federal right has been denied."

Here again is a case identical in principle with the case at bar. The contention of the plaintiff is that it had a right to acquire the land which could not be taken from it without impairing its charter and taking its property without due process of law, *i. e.*, depriving it of its Federal rights; and if it be assumed that the court below "rested its decision upon the want of right of the plaintiff" to acquire the land, its decision necessarily amounts to "a denial of the existence of the Federal rights which were adequately asserted;" and jurisdiction to enforce and protect the asserted Federal right therefore necessarily obtains.

In *Cornell Steamboat Co.* v. *Phoenix Construction Co.*, 233 U. S., 593, 598, 599, the State court expressly rested its judgment upon a concededly Federal ground and also upon the ground of negligence, and a motion to dismiss was made upon the ground that "the second proposition upon which the court based its decision, that is, the happening of the accident solely as the result of the negligent conduct of the Steamboat Company, is an independent State ground broad enough to sustain the judgment without the necessity of considering the Federal question involved in the first proposition." But this view was rejected and the motion to dismiss denied because the question of negligence was *necessarily intermingled with the elements necessary to be considered to determine the Federal right.* The court said, per Mr. Chief Justice WHITE:

> "It is indeed true that the fact of negligence in and of itself abstractly considered may be a state question concerning which we would accept, and indeed it may be conceded

> would be bound by the conclusion of the state court. But when negligence involves and concerns a subject of Federal jurisdiction which it is our duty to decide, to the extent necessary to enable us to discharge that duty, we must consider and review the subject independent of the action of the state court. *Southern Pacific Co.* v. *Schuyler,* 227 U. S., 601, 612."

In view of these authorities there can be no doubt that the questions of inability to agree and necessity for the appropriation are, as stated at page 20 of our first brief, "mere premises from which the existence of the asserted Federal right is to be deduced." And even if their determination involve a consideration of questions of fact and of local or general law, that would not cause them to be unexaminable here. (See, particularly, *Kansas City So. Ry.* v. *Albers Commission Co.,* cited *supra.*)

Recurring to the language of Mr. Justice VAN DEVANTER in *Enterprise Irrigation District* v. *Farmers Mut. Canal Co.,* already quoted, the non-Federal questions are so interwoven with the Federal question that they are not independent matters and any decision that might be reached upon them necessarily involves a decision of the Federal question. The jurisdiction of this court is consequently clear.

Indeed, if it were held that this court has no jurisdiction because the determination of the existence of the asserted Federal right involves an inquiry into the facts and an application of the principles of general law to those facts, scarcely any case could be brought here from the State courts. For it is rare indeed that a contro-

versy arises in a State court which does not involve a determination of the legal effect of facts and depend, to some extent at least, upon principles of general jurisprudence.

It may be added, too, that, so far as can be discovered by a careful examination, in each of the cases in which this court has declined to take jurisdiction because the judgment rested upon an independent non-Federal ground broad enough to sustain it, the situation has been such that *conceding the existence of the Federal right* the plaintiff was nevertheless unable to enforce it because of some intervening cause that gave rise to an affirmative defense—such as laches, *res adjudicata*, statute of limitations, or estoppel. Of course we do not mean that this enumeration is necessarily exhaustive, but we do mean that in each case there was some element unconnected with the bare existence of the Federal right. In the case at bar the situation is entirely different. One cannot concede the existence of the plaintiff's asserted contract and property right to acquire the land without conceding that the judgment must be reversed.

What the defendants' argument thus really amounts to is, not that *conceding the existence of the asserted Federal right* the judgment may yet be sustained upon some other ground, but that *the State Court may have held that the Federal right never existed* because the plaintiff did not show inability to agree or the necessity for the appropriation. "And from this it follows that the proposition now relied upon when rightly considered comes to this, that jurisdiction to enforce and protect a Federal right obtains in no case where such Federal right has been denied."*

*Mr. Chief Justice White in **Bowe v. Scott**, 233 U. S., 658, 662, 663.

This is clearly a case in which this court has the power and the duty to take jurisdiction and *examine the record* and by passing upon "the legal effect of the evidence" determine "what facts might reasonably be found therefrom which would furnish a basis for the asserted Federal right."

B.—The judgment does not rest upon any of the so-called local questions.

Assuming now, for the sake of the argument, that the issues as to inability to agree and necessity for the appropriation are separate, independent, non-Federal questions, we proceed to show the judgment does not rest upon them.

It is a significant fact that the defendants do not undertake to say that the State court *did* decide the case upon these questions. They say that the decision "*may have been*" based upon them (Brief, p. 17) and that the record gives "reasonably satisfactory evidence" that it was (id., p. 18). But they fail to give any reference to any part of the record to substantiate the statement; and they concede the possibility of the decision having been based upon the Federal question. In short, they plant themselves squarely upon the proposition that

> "It is *not necessary that the record should show that the decision of the State court is based upon a purely local question* in order to establish that this court will not take jurisdiction" (Brief, p. 18).

As already shown, however, that proposition is not correct.

We respectfully urge that the statement by

Mr. Chief Justice WHITE in *St. Louis & Iron Mt. Ry.* v. *McWhirter, supra,* embodies the true rule to be applied in those cases in which the silence of the State court creates uncertainty with respect to the actual ground upon which the judgment is based.

But whether the court follow that rule (*i. e.,* whether it absolutely refuse to conjecture that because there may have been a potentiality of considering the case from a non-Federal point of view therefore it was considered and decided in that aspect), or whether it test its jurisdiction in the manner in which it was tested in *Johnson* v. *Risk* and the other cases cited above, (*i. e.* by examining the *merits* of the non-Federal question), the result in this case will be the same. For in the present case the record clearly shows that the alleged non-Federal grounds are *not* "good and valid," and, indeed, even demonstrates that the so-called "local questions" are so clearly frivolous, untenable, and devoid of merit, as to make it impossible to assume that the State court rested its judgment upon them, without, by the same token, showing that the judgment is "essentially arbitrary."

Inability to Agree.—The defendants do not even assert that there was any merit in the claim that inability to agree was not shown. They state their position upon this point as follows (Brief, p. 12):

> "Plaintiff undertook to prove that there had been negotiations for the purchase of the property before it commenced its proceedings to condemn and to show that it had been unable to agree with the owner of the property in regard to the compensation to be paid. Defendants *endeavored to prove* that

> plaintiff had been *negotiating with the wrong parties,* that they were fully advised that the property was owned by the Northern Ohio Traction and Light Company but failed to show any satisfactory evidence of inability to agree in regard to the compensation to be paid with *any agents or representatives of that company.*"

The uncontradicted and undisputed evidence, however, clearly shows that the plaintiff actually negotiated for the property with *certain individuals who were officers of* BOTH OF THE DEFENDANTS *and held themselves out as having "the matter in hand for selling the property";* and there is no dispute about the fact that these individuals expressly refused the plaintiff's offers and *stated that the property was not for sale and would not be parted with at any price* (Rec., pp. 45-47, 53, 54. See, also, pages 14 and 25 of our brief). Nor is there any suggestion that these individuals were not fully and duly authorized to speak for BOTH CORPORATIONS.

The contention that the plaintiff had been "negotiating with the wrong parties" (by which it is meant that the plaintiff negotiated with the defendant *Realty* Company while the property was "owned" by the defendant *Traction* Company) is thus entirely untenable.

It is true that certain written offers were addressed to the Realty Company (Rec., pp. 199, 200), which offers were before Mr. Bacon (the plaintiff's agent) and Mr. Christy (President of the Realty Company) at the time they discussed the proposed purchase and sale (Rec., p. 49). But *before these negotiations were taken up*

with Mr. Christy, the plaintiff's agent (Mr. Bacon) had discussed the matter with Mr. Currie, *Vice-President and General Manager of the Traction Company* (Rec., p. 75), and asked him "whether or not they would sell that property that we had been talking about" (which, as appears at page 45 of the record, was indicated by reference to the property described in the former case—mentioned at page 11 of our brief —and which is identical with the property described in the petition in this case) and Mr. Currie said "nothing doing, or something to that effect" (Rec., p. 46). Then, after some further talk, Mr. Currie said, "If you don't believe me see Mr. Christy" (Rec., p. 46). *It was then that the negotiations were taken up with Mr. Christy—that is, after the Traction Company's Vice-President and General Manager had referred the plaintiff's agent to Mr. Christy.* And although Mr. Currie was called to the witness stand as a witness for the defendants (Rec., pp. 75-79) he was not asked a single question with respect to his conversation with Mr. Bacon and did not in any way contradict what Mr. Bacon had testified that he had said. Mr. Christy was not called to the stand at all.

Upon a familiar principle, the Traction Company would be bound by whatever Mr. Christy said to Mr. Bacon, even though Mr. Christy were not an officer of and had no official connection with the Traction Company, because the plaintiff's agent who was conducting the negotiation was expressly and directly referred to him by the Traction Company's Vice-President and General Manager.

But aside from this, *Mr. Christy was an officer of the Traction Company, also, to wit: a Vice-President of it*, and it is manifestly absurd for the defendants to attempt to distinguish between what Mr. Christy said to Mr. Bacon as President of the Realty Company and what he said to Mr. Bacon as Vice-President of the Traction Company. It is equally absurd to say that, when a negotiation for the purchase of property is undertaken with a man who is an officer of each of two corporations having common officers and the stock of one of which is owned by the other (Rec., pp. 210, 54, 114, 283) and that man says the property is "not for sale" and will not be parted with at any price, and that "he would not entertain any proposition for the purchase of it" (Rec., pp. 46, 54), there has been "no negotiation" and "no inability to agree" with that one of the two corporations which is now claimed to have been the owner of the property. Mr. Christy did not refuse to negotiate with Mr. Bacon because he (Christy) was not authorized to speak for "the owner," but because "they would not part with the property at any price" (Rec., p. 46), and it would be the extreme of *finesse* to say, as the defendants must in order to sustain their position, that his voice was the vioce of the Realty Company and that when he spoke the Traction Company did not hear what he said.

In addition to the negotiations just mentioned, the record as a whole (particularly the testimony of Mr. Bacon) shows that numerous efforts had been made to secure the land for the present plaintiff for several years preceding the institution of this suit. The defendant Traction Company had definite and

precise notice and knowledge of the property which was wanted, not only because of Mr. Bacon's numerous communications and conferences with its officers, but, also, because it had been made a party to the prior proceeding for the acquisition of this land along with other parcels, which is referred to on pages 11 and 12 of our brief (see Rec., pp. 48-51, 227-230, 129-130).

The plain purpose of the statute in requiring proof of inability to agree is to prevent a corporation from haling the land-owner into court without giving him an opportunity to agree on the compensation which he is to receive for his land if he be actually willing to sell at a price which the corporation is willing to pay—that is, "give the owner an opportunity to sell his property to the corporation and thus save him the trouble and cost incident to an appropriation proceeding should an agreement be reached."

Louisville &c. R. Co. v. *Cincinnati*, 10 Ohio N. P., (N. S.) 649, 655.

In the present case each of the defendants had ample notice of the plaintiff's desire to acquire the land and ample invitation and opportunity to come to an agreement with it as to the amount of the compensation if either of them really desired to do so. The real object and purpose of the statute obviously was accomplished.

It consequently follows that even though it be assumed that the Traction Company's very precarious and attenuated claim that it was "the owner" was sustained, the various letters to it and the conferences had by Mr. Bacon and particularly the oral negotiations which were actually

had with Mr. Currie and Mr. Christy amply establish the plaintiff's inability to agree with it. Indeed, when Mr. Currie said "nothing doing" all chance of the plaintiff's getting the land, save by resort to an appropriation proceeding, was absolutely and finally removed. The refusal of the Traction Company to sell, the plaintiff's "inability to agree" with it, was then complete and final.

Moreover, the Traction Company, after voluntarily making itself a party to the case, at once challenged the right of the plaintiff to acquire the property upon grounds wholly unconnected with any question of agreement as to the price (Rec., p. 20). It is a general rule that where the owner denies the right of the corporation to take the property no attempt to agree with him as to the price need be made.

Lewis, Eminent Domain, §499.

And this rule is of controlling force here, because, contrary to the notion apparently entertained by the defendants, the Ohio statute does not require *negotiation.* It merely requires "inability to agree," which, of course, may exist even though no negotiation be had.* Where, as here, an owner assumes an attitude hostile to the proposed improvement and takes the position that his land is not subject to appropriation because it is required for an inconsistent public use, "inability to agree" is clearly shown even though there was no negotiation whatever. In brief, as was said in *Toledo Consol. St. Ry Co.* v. *Toledo*

*Under a New York statute that authorized condemnation proceedings when the Corporation is "unable to agree" a proceeding was sustained without any negotiation whatever because of uncertainty as to the title. The Court said: "The spirit of the statute is to require the plaintiff to keep out of court if it reasonably can, but to permit it to resort to the court when it reasonably ought." (Stillwater &c. R. Co. v. Slade, 36 N. Y., App. Div., 587, 593).

Elec. St. Ry. Co., 6 Ohio Cir. Ct., 362, 388, 389, the record is "permeated and saturated with evidence of the fact that it was impossible for these contesting companies to agree" because there was "a radical and irreconcilable difference of opinion—*an irrepressible conflict*—so to speak." One was seeking to get the land for one public use. The other was asserting that it was "required" and was "being utilized" for another public use and that the plaintiff's proposed use was "entirely destructive of and inconsistent with" the use asserted by the Traction Company; (Rec., p. 20) and that was its contention throughout the case. Agreement was impossible. And in determining whether "inability to agree" was shown, the court must "look to the whole record" (case last cited).

In addition to all this, the statute does not in all cases require a showing of inability to agree *with the owner*. The language of the statute is:

> "Appropriations can be made only when the corporation is unable to agree with the owner, OR HIS GUARDIAN OR TRUSTEE, as to the compensation to be paid for the property or easement or interest therein, sought to be appropriated, or when the owner is incapable of contracting in person or by agent, and has no guardian or trustee, or is unknown, or his residence is beyond the state, or unknown."
>
> *Ohio General Code*, Sec., 11039.

If, as asserted by the defendants' counsel upon the hearing, the Realty Company and "all of the original holders of this property were *trustees for The Northern Ohio Traction and Light Com-*

pany" (Rec., pp. 57, 151, 232), obviously a negotiation by the plaintiff with the Realty Company was sufficient as to the Traction Company also.

At page 151 it was expressly stated that the property was of a "trust character," and at page 232 the defendants' object in putting the Realty Company's charter in evidence was stated to be "for the purpose of showing that corporation acts *as trustee* for another only." Again, it was testified at page 73 that the Realty Company was "organized for the purpose of handling property that is not in daily operation in connection with the Traction Company." According to these claims, the express language of the statute conclusively shows that negotiation with the Traction Company was unnecessary.

The entire contention that the plaintiff failed to show inability to agree is a mere *quibble* based upon a question of "ownership" as between two corporations having common officers, one of which was brought into being and the stock of which is owned by the other (Rec., pp. 210, 54, 114, 283). The two together concededly represent the entire ownership, legal and equitable, and both of them are defendants in this case.

Necessity for the Appropriation.—The suggestion now advanced that the State court may have rested its decision upon the ground that such necessity was not shown is really foreclosed and precluded by the fact that *the defendants did not in any way raise or present that question in the motion to dismiss which was made at the close of the trial* (See Record, p. 232; Defts'. Brief, p. 9). The defendants made no motion whatever to dismiss the proceeding at the close of the plaintiff's case—thereby conceding that upon its own evi-

dence the plaintiff was clearly entitled to prevail —and not having themselves introduced any evidence upon the subject or included the question in the motion to dismiss at the close of the whole case, the question was not even conceivably open for decision in the State court. It was not preserved or saved by any motion, request, or exception whatever.

But entirely aside from this, the statements contained in the defendants' brief upon this motion conclusively demonstrate the necessity. At page 15 it is stated:

> "The development under this plan *will, of course, damage this property, for it will deprive it of the ordinary flow of the river.* No water will come below the Gaylord dam except the seepage through the dam and in times of high water."

Again, at page 24, it is stated:

> "If defendants are willing to forego *their right to enjoin plaintiff from consummating this plan* on the ground that under the statutes of the state plaintiff has no right to divert the water of the river in the way contemplated by the plan, plaintiff, instead of needing any of the defendants' property, *would be under the burden of paying damages to defendants for depriving them of the ordinary flow of the river.*"

Thus it is plainly admitted that the plaintiff's plans cannot be carried out without damaging the defendants' property to the extent of substantially entirely depriving it of water—that is, without taking the water which is appurtenant to the land. It is further asserted, in effect, that,

by reason of the fact that the consummation of the plan would damage the defendants' land, the defendants would have a right to enjoin the plaintiff from proceeding. The defendants do not say they *would* forego this right, but even if they did they assert that the plaintiff would yet be "under the burden of paying damages to the defendants for depriving them of the ordinary flow of the river." *In other words, the situation is such that if the plaintiff went ahead without acquiring the defendants' land it would be immediately stopped by an injunction;* and it is in recognition of this fact that the present proceeding was instituted *for the very purpose of assessing the defendants' damages, paying the same to them, and thus placing the plaintiff in a situation where it can go ahead with the construction of its plant.*

We repeat, too, that the indispensability of the land was clearly established by evidence (See pp. 14, 24 and 25 of our brief, and pages of the record there mentioned), *which evidence the defendants made no attempt whatever to controvert.*

A stronger and clearer case of necessity can scarcely be imagined, and for this reason, as well as for the others already mentioned, it is impossible to say that the State court rested its judgment upon the ground that necessity had not been shown.

IN CONCLUSION, we draw attention to the fact that the record as a whole shows that the one great question which dominated the case from beginning to end was the Traction Company's assertion that the plaintiff could not acquire the land because of the devotion of it to a public use which was claimed to have been brought about by

the Traction Company's "dummy," The Northern Ohio Power Company. That was the defense distinctly stated at the opening of the case; that was the question to which the defendants' evidence was addressed; and that was the question which was really presented in the arguments. The formal "preliminary questions" were practically conceded. The question of inability to agree, while formally preserved by the oral motion made at the close of the trial, was a mere "makeweight" of no serious importance.

To say that the judgment rests upon the so-called "local questions" would convict the State court of having deliberately evaded the real question in the case and rendered an arbitrary decision as "a mere device to prevent a review" or "evade the jurisdiction of this court." If that be the situation, then the jurisdiction of this court is just as clear and plain as if the State court had actually rested its judgment upon the Federal question (*Enterprise Irrigation District* v. *Farmers' Mutual Canal Co., supra*).

We ask that the motion be denied. If not denied now, its consideration should be postponed until the oral argument.

Respectfully submitted,

WILLIAM Z. DAVIS,
JOHN L. WELLS,
CARROLL G. WALTER,
Counsel for Plaintiff-in-Error.

April, 1917.

Office Supreme Court, U. S.
FILED
DEC 2 1916
JAMES D. MAHER
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1916.

No. 342

THE CUYAHOGA RIVER POWER COMPANY,
Plaintiff-in-Error,

against

THE NORTHERN REALTY COMPANY AND THE NORTHERN OHIO TRACTION AND LIGHT COMPANY,
Defendants-in-Error.

MOTION TO DISPENSE WITH PRINTING AN EXHIBIT, AND NOTICE THEREOF.

JOHN L. WELLS,
CARROLL G. WALTER,
Counsel for Plaintiff-in-Error.

CHAS. P. YOUNG CO., PRINTERS, 19 Beaver St., N. Y.

Supreme Court of the United States,

OCTOBER TERM—1916.

THE CUYAHOGA RIVER POWER COMPANY, *Plaintiff-in-Error,* *against* THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION AND LIGHT COMPANY, *Defendants-in-Error.*	No. 342.

Motion to Dispense with Printing an Exhibit.

Now comes the above named plaintiff-in-error and moves the court for an order dispensing with the printing of Plaintiff's Exhibit 1 attached to the deposition of Daniel R. Bacon.

The following is a brief statement of the facts and matters involved and of the reasons for this application.

This case comes here upon a writ of error to the Court of Appeals of the State of Ohio, Eighth District. That court does not require that the records in cases brought before it be printed. In consequence of this fact the record of this case as filed in this court is in manuscript form and no printed copies are in existence. The Clerk of this court has estimated the cost of printing the record at $1,220, and the Clerk's fees at $380.

Included in the estimate of $1,220 as the cost of printing the record is the following item: Maps $479.

The maps which make up the bulk of this item are two large maps showing the project of the Cuyahoga River Power Company. The maps are attached to the deposition of Daniel R. Bacon and are marked respectively "Plaintiff's Exhibit 1" and "Plaintiff's Exhibit 2." The nature and relation of these maps are fully shown in the following excerpt from the deposition of Mr. Bacon, which forms a part of the record in this case:

> "Q. Aside from a personal examination of the premises, have you made any other examination or study of the project of the Cuyahoga River Power Company? A. Yes.
>
> "Q. And by what means? A. By means of the topographical maps of the section.
>
> "Q. In speaking of the topographical maps of the section, what maps do you have reference to? A. The United States government geological survey topographical sheets.
>
> "Q. Those topographical sheets, what do you know as to their accuracy? A. They are considered accurate for all preliminary work, within ten per cent.
>
> "Q. Have you assembled any of the topographical publications of the Geological Survey with a view of getting the project of the Cuyahoga River Power Company? A. Yes.
>
> "Q. Have you such a map as that, such an assembled map? A. Yes.
>
> "Q. Will you kindly produce it for us?
>
> Maps offered marked Plaintiff's Exhibit No. 1 and Plaintiff's Exhibit No. 2.
>
> "Q. I now direct your attention to the map marked Plaintiff's Exhibit No. 1 and identi-

fied by the signature of Jessie MacLardy, notary public, under date of March 13, 1914, and ask you whether this is the map you have reference to in your last answer? A. Yes.

"Q. State whether or not this series of maps covers the region involved within the project of the Cuyahoga River Power plant as you have stated? A. Yes.

"Q. Are you willing to have that map attached to your deposition and made a part of it? A. Yes.

This is accordingly done.

"Q. I now direct your attention to the map marked Plaintiff's Exhibit No. 2, identified further by the signature of Jessie MacLardy, notary public, under date of March 13, 1914, and ask you whether you have examined this map? A. Yes.

"Q. Are you able to state what if any relation there is between this map and the previous map marked Exhibit No. 1? A. This map appears to be a tracing covering only the essential features of the development of the Cuyahoga River Power Company project.

"Q. Have you examined this map sufficiently so that you are able to state whether or not it is a tracing, whether it is on the same scale? A. It is on the same scale.

"Q. And have you examined it sufficiently so that you know it is a tracing of a portion of the topographical maps? A. Yes.

"Q. Are you willing to have this map attached to your deposition and made a part of it? A. Yes.

This was accordingly done.

"Q. The map Exhibit No. 2—state whether or not that shows any matters which are not

shown on the topographical maps, and in general what does it show in that respects? A. It shows the location of the dams and pipe lines and canals and more in detail the reservoir sites than shown on the topographical map."

The plaintiff-in-error already has and will furnish to the Clerk for insertion in the record of this case a sufficient number of copies of Plaintiff's Exhibit 2; but the plaintiff-in-error has no copies of Plaintiff's Exhibit 1. In order, therefore, to save the large expense of making a plate from which to print Plaintiff's Exhibit 1, and in order to avoid the duplication of exhibits, the plaintiff-in-error asks that the printing of Plaintiff's Exhibit 1 be dispensed with.

The plaintiff-in-error submits that the printing of Exhibit 1 will not be of any assistance to the court in determining the issues in the case, in view of the fact that Exhibit 2 is substantially a duplicate, and that printing of the same is thus a useless expense.

In addition to this, the originals of both maps are now on file in this court as a part of the transcript of record, and are thus available for inspection if such inspection should become desirable for any reason.

Respectfully submitted,

JOHN L. WELLS,
CARROLL G. WALTER,
Counsel for Plaintiff-in-Error.

Sir:

Please Take Notice that the plaintiff-in-error, The Cuyahoga River Power Company, will sub-

mit the foregoing motion to the Supreme Court of the United States at a Stated Term thereof on Monday, December 18th, 1916, at the Capitol, in the City of Washington, D. C., at the opening of court on that day or as soon thereafter as counsel can be heard.

Dated, New York, November 25, 1916.

Yours, etc.,

JOHN L. WELLS,
CARROLL G. WALTER,
Counsel for Plaintiff-in-Error,
120 Broadway,
New York,
N. Y.

To
S. H. TOLLES, ESQ.,
Counsel for Defendants-in-Error,
Williamson Building,
Cleveland, Ohio.

Supreme Court, U. S.
FILED
APR 16 1917
JAMES D. MAHER
CLERK

No. 342.

OCTOBER TERM, 1916.

IN THE Supreme Court of the United States

THE CUYAHOGA RIVER POWER COMPANY,
Plaintiff-in-Error,

AGAINST

THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION AND LIGHT COMPANY,
Defendants-in-Error.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

BRIEF FOR DEFENDANTS-IN-ERROR SUR MOTION TO DISMISS.

JOSEPH S. CLARK,
JOHN C. WEADOCK,
TOLLES, HOGSETT, GINN & MORLEY,
Attorneys for Defendants-in-Error.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA

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Supreme Court of the United States.

OCTOBER TERM, 1916. No. 342.

The Cuyahoga River Power Company, Plaintiff in Error,

vs.

The Northern Realty Company and The Northern Ohio Traction and Light Company.

MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM JUDGMENT.

Now comes The Northern Realty Company and The Northern Ohio Traction and Light Company, by counsel appearing in their behalf, and move this Honorable Court:

First.—To dismiss the writ of error herein for the following reasons, to-wit:—

(*a*) This Court has no jurisdiction because the writ of error was directed to the Court of Appeals of Summit County, Ohio, instead of to the Supreme Court of that State.

(*b*) This Court has no jurisdiction because the alleged federal question did not control the decision of the State Court.

(*c*) This Court has no jurisdiction because no federal question is involved in the case.

Second.—To affirm the judgment of the Court of Appeals of Summit County, State of Ohio, on the ground that it was manifestly correct and this writ of error was taken for delay only and the questions upon which it is claimed

the jurisdiction of this cause depend are so frivolous as not to require further argument.

JOSEPH S. CLARK,
JOHN C. WEADOCK,
TOLLES, HOGSETT, GINN & MORLEY,
Attorneys for Defendants in Error.

To William C. Davis, John L. Wells, Carroll G. Walter.

Please take notice that on the 16th day of April, A. D. 1917, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for a decision of the Court thereon. Annexed hereto is a copy of our brief of argument in support of said motion.

JOSEPH S. CLARK,
JOHN C. WEADOCK,
TOLLES, HOGSETT, GINN & MORLEY,
Attorneys for Defendants in Error

BRIEF ON MOTION TO DISMISS FOR WANT OF JURISDICTION.

Statement of Case.

The Cuyahoga River Power Company, plaintiff in error, is a corporation organized under the General Incorporation Act of the State of Ohio to construct and operate a hydro-electric plant on the Cuyahoga River between certain specified points. The Ohio statutes contemplate the development of the water powers in the rivers and streams of the State and authorize the organization of corporations with the right of eminent domain to acquire such properties and rights as may be needed for their corporate purposes. This company, by its charter, designated a substantial portion of the valley of the Cuyahoga River as its field of operations. It claims that by designating this portion of the Cuyahoga River, which it wrote into its charter at its own will, it acquired the right to condemn for its purposes any lands lying within this location. A look at the maps opposite page 304 of the record shows that this territory in-

cludes the populous village of Cuyahoga Falls. The property of defendants, which the Power Company is attempting to condemn in this suit, lies in the valley of the Cuyahoga River within the points designated.

The case was tried in the Court of Common Pleas of Summit County. The issues were the several issues for which the Ohio statute regulating condemnation proceedings of this kind provides, that is,

1. The existence of the corporation.

2. The right to make the appropriation.

3. Inability to agree as to the compensation to be paid, and

4. The necessity for the appropriation.

On these issues the Court of Common Pleas rendered judgment in favor of defendants in error. By writ of error the case was taken to the Court of Appeals of Summit County, which affirmed the judgment of the Common Pleas. Plaintiff in error then filed a motion in the Supreme Court of Ohio for an order to direct the Court of Appeals to certify its record to the Supreme Court on the theory that the case was one of public interest and of great general interest. This petition presented certain constitutional questions and thereafter plaintiff in error, evidently being advised that if these constitutional questions were in fact involved in the case, it had a right to a writ of error from the Supreme Court, prepared and filed its petition in error in that Court.

Defendant in error filed a motion in the Supreme Court of Ohio to dismiss this petition in error on the ground that the Court was without jurisdiction, as the case did not involve any question arising under the Constitution of Ohio or the Constitution of the United States. The Supreme Court of Ohio sustained that motion and dismissed the petition in error. Thereupon plaintiff in error sued out its writ of error from this Court to the Court of Appeals of Summit County, the intermediate Appellate Court.

Plaintiff in error has been plaintiff in every stage of this case, and will be hereinafter called plaintiff, and defendant in error will be called defendant.

I.

THIS COURT HAS NO JURISDICTION BECAUSE THE WRIT OF ERROR WAS DIRECTED TO THE COURT OF APPEALS OF SUMMIT COUNTY, OHIO, INSTEAD OF TO THE SUPREME COURT OF THAT STATE.

Under Section 237 of the Judicial Code the State Court to which the writ of error should be directed is "the highest Court of the State in which a decision in the suit could be heard." Under the Constitution of the State of Ohio, Article 4, Sections 2 and 6, the highest Court of that State in "cases involving questions arising under the Constitution of the United States or of this State" is the Supreme Court. The Supreme Court of Ohio passed upon this case. In order to determine the nature of the action taken by that Court and following the rule laid down in Norfolk and S Turnpike Co. *vs.* Virginia, 225 U. S. 265, we turn to the order entered in the case by that Court. It reads as follows:—

"661. Supreme Court of the State of Ohio, of the Term of January, A. D., 1915.

Towit: Tuesday, March 23rd.

STATE OF OHIO,
CITY OF COLUMBUS:

No. 14803.

The Cuyahoga River Power Company

vs.

The Northern Realty Company and The Northern Ohio Traction and Light Company.

ERROR TO THE COURT OF APPEALS, SUMMIT COUNTY.

This cause came on to be heard upon the motion of the plaintiff, The Cuyahoga River Power Company, for an order directing the Court of Appeals of Sum-

mit County to certify its record in the above entitled case to the Supreme Court of Ohio for review, for reasons stated in said motion; and it appearing that said plaintiff claims in said motion that said record involves questions arising under the Constitution of the State of Ohio and the Constitution of the United States, the said plaintiff filed in this Court its petition in error in said case as a matter of right, according to the practice of this court; and thereupon this cause came on to be heard on the motion of the defendants to dismiss said petition in error on the ground that said cause does not involve any question arising under the constitution of Ohio or the Constitution of the United States, and that the same is not a case of public or great general interest, together with said motion of plaintiff for an order directing the said Court of Appeals to certify its record in said cause to this Court for review, and said motions were argued by counsel and submitted to the Court and the Court having considered the same does find that this Court is without jurisdiction in the premises, said cause being neither one of public or great general interest, nor does it involve any question arising under the Constitution of the United States or the State of Ohio.

It is, therefore, ordered and adjudged that said motion to dismiss said petition in error be, and it is hereby, sustained, and said petition in error is dismissed; and that the said motion to direct the Court of Appeals to certify its record to this Court be, and it is hereby, overruled.

It is further ordered that defendants in error recover from plaintiff in error their costs herein, expended, taxed at $."

This order shows that plaintiff filed in the Supreme Court of Ohio its petition in error as a matter of right according to the practice of the Court and that the case was heard on motion to dismiss this petition on the ground that no constitutional question was presented and that this motion was

argued and considered by the Court, which found that it was without jurisdiction as the case does not involve any constitutional question, and thereupon dismissed the petition.

We are not unmindful of the rule laid down in Norfolk & S. Turnpike Co. *vs.* Virginia, 225 U. S. 265, which is that

> "where a writ of error is prosecuted to an alleged judgment or a decree of a Court of last resort of a State, declining to allow a writ of error to or an appeal from a lower State Court, unless it plainly appears, on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the Court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits, we shall consider ourselves constrained to apply the rule announced in the Crovo case, and shall therefore, by not departing from the face of the record, solve against jurisdiction the ambiguity created by the form in which the State Court has expressed its action."

We appreciate that the Supreme Court of Ohio did not affirm in express terms the judgment of the Court of Appeals and also that the Supreme Court did not exercise its jurisdiction to review the entire case upon the merits, but only to review that part of the case which relates to the claim that constitutional questions are involved. On the other hand, it seems reasonably clear that this case does not come within the scope of the above rule. The Supreme Court of Ohio did not decline to allow a writ of error to the Court of Appeals, in fact, the Supreme Court had no discretion in that regard. The writ of error was filed as a matter of right. This differentiates the case from Gregory *vs.* McVeagh, 90 U. S. 294; Western Union Tel. Co. *vs.* Crovo, 220 U. S. 366; N. & S. Turnpike Co. *vs.* Virginia, 225 U. S. 265; Stratton *vs.* Stratton, 239 U. S. 55, and C. C. C. St. L. R. Co. *vs.* Dettelbach, 239 U. S. 589.

Nor is there any ambiguity created by the form in which the State Court has expressed its action. That Court, after

the case was docketed and a motion to dismiss on the ground that no constitutional question was presented was filed, called the case for argument, heard argument and sustained the motion. This action is clear, concise and not ambiguous. Plaintiff is aggrieved by that order, not because the Court refused to consider its case, but because that Court in considering its case determined that no question was involved arising under the Constitution of the United States. If in that judgment the Supreme Court of Ohio was right, this Court has not jurisdiction. It is that judgment that plaintiff in error should ask to have reversed.

In Missouri K. & T. Rwy. Co. *vs.* Elliott, 184 U. S. 530, the decision to the effect that the writ of error was properly directed to the lower State Court rather than to the Supreme Court of Missouri was based upon the peculiar language of the Missouri Constitution.

In Western Union Tel. Co. *vs.* Hughes, 203 U. S. 505, the decision to the effect that the writ of error directed to the Supreme Court of Virginia must be dismissed on the ground that it should have been directed to the lower Court must necessarily have been affected by the journal entry of the Supreme Court of Appeals to the effect "that the writ or error was improvidently awarded," which naturally implied that the Court had jurisdiction to entertain the writ or not in its discretion.

In Valley S. S. Co. *vs.* Wattawa, 241 U. S. 642, the writ of error was directed to the Supreme Court of Ohio and was dismissed by this Court for want of jurisdiction. The Supreme Court of Ohio had dismissed the writ of error filed in that Court, directed to the lower State Court, but it did not specify its reason for so doing. This Court dismissed the writ "for want of jurisdiction upon the authority of Western Union Tel. Co. *vs.* Crovo, 220 U. S. 364; Norfolk & S. Turnpike Co. *vs.* Virginia, 225 U. S. 264, and Stratton *vs.* Stratton, 239 U. S. 55." In these three cases the question involved was whether the Court of last resort of the State had dismissed the writ in the exercise of a dis-

cretion. This must have been the bass for the dismissal of the writ in the Wattawa case by the Supreme Court of Ohio and on that account, under the rule laid down in the Norfolk Turnpike case, *supra*, the writ of error from this Court should have been directed to the State Circuit Court of Appeals.

Under the laws of Ohio the Supreme Court of that State is the highest Court in cases involving constitutional questions. That Court must take jurisdiction of all such cases. It has no discretion to decline or reject a writ of error directed to a lower State Court. This case was docketed in the Supreme Court of Ohio and that Court heard and determined the very question which this Court must decide on this motion to dismiss for want of jurisdiction, towit, is a constitutional question involved. The Supreme Court of Ohio decided that question against the plaintiff and plaintiff should sue in this Court to reverse the order of the Supreme Court of Ohio and should have directed his writ of error to that Court.

II.

THIS COURT HAS NO JURISDICTION BECAUSE THE ALLEGED FEDERAL QUESTION DID NOT CONTROL THE DECISION OF THE STATE COURT.

There is no dispute in regard to the issues that were presented to the trial Court. In the brief filed for plaintiff, page 5, the statement is made that the following questions specified in the statute were heard and determined, viz:—

"1. The existence of the corporation.

"2. Its right to make the appropriation.

"3. Its inability to agree as to the compensation to be paid for the property.

"4. The necessity for the appropriation."

The statute referred to is Ohio General Code, Sections 11039-11046.

On page 14 of this brief we find:—

> "The case came on for hearing in that Court upon the four preliminary questions, mentioned above, on March 20th, 1914."

Counsel for plaintiff makes much of the statement made by counsel for the defendants upon the opening of the trial (Record, page 20) to the effect that the defence was based upon the proposition that the property is owned by the defendant, a public service corporation, and that the plaintiff seeks to destroy the use for which the property was acquired and for which it has been developed and was at the time being utilized by the owner. It is true that that was one of the defences, but, as the trial progressed, it was evident that the plaintiff was having great difficulty in presenting proper proofs on the points mentioned above which are conditions precedent to its right to condemn, even assuming that it had that right. At the end of the trial, counsel for defendants made the following statement (Record, page 232):—

> "MR. MATHER:—The defendant moves the Court that the plaintiff's petition in this proceeding be dismissed for the reason that there is no evidence proving that there was any attempt or failure to agree with the owner of the property before beginning the proceeding for the appropriation of the property described in the petition, and that the plaintiff has no right to appropriate the property described in the petition.
>
> THE COURT:—That raises the whole issue. This motion will be ruled on after the briefs in the case have been submitted. I will reserve a ruling on the motion until after the briefs in the case have been submitted and the Court has had an opportunity to study the same. * * *
>
> And thereupon counsel for plaintiff and counsel for defendant submitted to the Court their briefs and the Court upon consideration of the evidence and the briefs of counsel on the 1st day of May, A. D. 1914, decided

upon the issue as submitted in said cause in favor of the defendant, to which decision of the Court the plaintiff then and there duly excepted, all of which more fully appears of record in said case."

Plaintiff filed its petition in error in the Court of Appeals (Record, pages 308-310) and with the petition filed a transcript of the docket and journal entries (Record, pages 306-307). Among these entries is the following:—

"May 1st, A. D. 1914. April Term. This cause came on to be heard upon the pleadings, evidence and exhibits and was argued by counsel and submitted to the Court, whereupon the Court finds the issues in favor of the defendant and against the plaintiff."

In its petition in error filed in the Court of Appeals plaintiff assigns various errors, including the constitutional questions upon which it relies and also the following:—

"*First.*—Said Court erred in sustaining the motion of the defendants in error to dismiss said cause.

Sixth.—Said Court erred in holding that the description of the property which plaintiff in error sought to condemn was insufficient.

Eleventh.—Said Court erred in holding that proper offers for said property were not made.

"*Twelfth.*—Said Court erred in holding that the evidence did not show that plaintiff in error proved inability to agree."

The Court of Appeals entered its order in the case (Record, page 311), which contains the following:—

"This cause came on to be heard upon the petition in error, bills of exceptions, original papers and pleadings and the transcript of the record in the Court of Common Pleas and was argued by counsel and submitted to the Court; on consideration whereof the judgment of said Court of Common Pleas is affirmed."

Thereafter plaintiff filed its petition in error in the Supreme Court of Ohio (Record, page 315). In the first paragraph of this petition in error we find the following:—

> "A transcript of the docket and journal entries, whereof the bill of exceptions and such other original papers as are necessary to show the errors complained of, are filed herein."

The alleged constitutional questions are suggested in this petition. We also find the following:—

> "*Sixth.*—Said Court erred in holding that the evidence did not show that plaintiff in error proved inability to agree.
>
> "*Twelfth.*—Said Court erred in holding that the description of the property which plaintiff in error sought to condemn was insufficient."

The order of the Supreme Court of Ohio entered in the case (Record, page 319), has been quoted in full above, page 4.

The alleged Federal question arises out of Point 2 mentioned above, to wit:—

> "2. Its right to make the appropriation."

Plaintiff claims that under its charter it has a contract or property right in the bed of Cuyahoga River between the points designated as the location for its water power development and that this contract or property right was made more definite and specific by its plan of development adopted and approved by resolutions of its board of directors. Plaintiff further claims that defendants have, in force and effect, impaired its contract and deprived it of its property without due process of law in that, under their several charters, they have constructed a hydro-electric and steam power plant in the valley of the Cuyahoga River

within the points designated in the plaintiff's charter and have asserted a claim that these developments, being devoted to a public use, cannot be condemned by plaintiff, which claim the State Court has sustained.

For all of the purposes of this branch of the motion to dismiss, defendants may admit the full force of plaintiff's contention that a Federal question is presented. Even if this be true, it is none the less true and perfectly clear that the case presents other questions of a purely local character. The record shows that three purely local questions were presented and run all through the case. They are:—

First.—The question whether the plaintiff in fact complied with the statutory requirement that it must negotiate with the owner of the property which it proposes to condemn and must establish its inability to agree with the owner as to the compensation to be paid for the property before commencing condemnation proceedings.

Second.—The question whether the description of the property set forth by the plaintiff in its papers is a sufficient description within the meaning of the statute.

Third.—The question whether the plaintiff has satisfactorily shown the necessity for the appropriation.

Plaintiff undertook to prove that there had been negotiations for the purchase of the property before it commenced its proceedings to condemn and to show that it had been unable to agree with the owner of the property in regard to the compensation to be paid. Defendants endeavored to prove that plaintiff had been negotiating with the wrong parties, that they were fully advised that the property was owned by the Northern Ohio Traction and Light Company but failed to show any satisfactory evidence of inability to agree in regard to the compensation to be paid with any agents or representatives of that company. This point was expressly made the basis for the motion to dismiss, which was presented at the termination of the trial and which is quoted above (see Record, page 232).

If it be true that plaintiff's proof did not measure up to the standard required by the statute in regard to this question, it was a matter of no importance whether the plaintiff's contention in regard to the alleged Federal question is right or wrong. This statutory question is of itself quite sufficient to justify the decision of the State Court against the plaintiff and the record seems to show reasonably clearly that the trial Judge held with the defendants on this point. It appears that the motion to dismiss, which was expressly based upon this point, was sustained, and it further appears that plaintiff's writ of error filed in the Court of Appeals assigns as its first error that the Court erred in sustaining this motion to dismiss.

The sufficiency of the description of the property to be condemned and the necessity for the appropriation were both questions necessarily involved in the case. The burden of establishing both to the satisfaction of the Court rested with the plaintiff. The record shows two inconsistent plans of development. The first was presented by Roberts & Abbott under date December 29th, 1908, being plaintiff's Exhibit 19 (Record, pages 292-305). This plan involved the construction of two water powers, the upper and the lower. The upper was to be constructed higher up the stream than the property which plaintiff is endeavoring to condemn from defendants. The lower power was located on the stream below this property. The map which appears in the Record opposite page 304 shows the location of these two powers in red ink enclosing a star. The tract which plaintiff desires to condemn is shown in yellow lines on Defendants' Exhibit J, which is a map of "Milbank Park and Hydraulic Tract," and is the last of several maps following page 304 of the Record and immediately preceding page 305. The yellow lines are run at a distance of one hundred feet on each side of the center line of Cuyahoga River. Plaintiff fails to show any basis whatever for its effort to appropriate this long, narrow strip of land. The evidence does not show that the construction of the lower power would flood the land exactly one hundred feet on each side

of the center line of the river. It further appears that this strip of land includes the Northern Ohio Traction and Light Company railway bridge, a public highway bridge and other property which is not claimed by the plaintiff. As a matter of fact this Roberts & Abbott plan must have been abandoned for plaintiff at the trial presented a later plan as its plan of development. There were good reasons for abandoning this plan for in the "General Scheme" presented by the plan (Record, page 294) we find the following:—

> "The proposed dam is to be seventy feet in height and is to flood and displace five existing dams located in the village of Cuyahoga Falls, the upper one of which is located near the business center of the town."

Perhaps plaintiff found that there were other people who had interests in this river and that it would be difficult, and perhaps impossible, to eliminate their interests.

This later plan was prepared and presented by H. Von Schon, Consulting Engineer, under date December 29th, 1908 (Record, pages 249-282). It is explained by the map which appears opposite page 246 of the Record, and the general scheme is shown in that part of the plan which is printed on page 262 of the Record. It provides for the construction of the dam shown on the map as Gaylord Dam A above the village of Cuyahoga Falls and above the property which plaintiff is endeavoring in this proceeding to condemn from the defendants. Instead of flooding defendants' land it will withhold the water from it and back it up into the Brandywine. Another dam shown on the map as Mud Brook Dam B will keep the water from coming down the Brandywine into Mud Brook and the Cuyahoga River and force it down the Brandywine to a point on the north where a third dam, shown on the map as Brandywine Dam C is to be constructed, and from that point the water is to be taken through pipe lines cross country to the power station at Vaughan and discharged into the river at that point. The testimony (pages 40, 52, 239 and 245), shows very clearly that this Von Schon plan is plaintiff's plan of development.

Under this plan plaintiff does not need the tract of land which it is endeavoring to condemn in this case or any part of it. The development under this plan will, of course, damage this property, for it will deprive it of the ordinary flow of the river. No water will come below the Gaylord Dam except the seepage through the dam and in times of high water. Plaintiff has failed to show any basis whatever for its effort to condemn this property. It certainly will not be flooded, and there is no suggestion that any part of it is needed for the construction of dams, pipes or other structures which may constitute any part of plaintiff's proposed plant.

Under this Record it is very evident that some very important questions were presented for the determination of the trial Court as, for instance, proof of inability to agree, proof of sufficiency of description of the land which plaintiff is undertaking to condemn and proof of necessity to appropriate. All of these questions are purely local questions, and any one of them was quite sufficient to justify the decision of the Court denying plaintiff's claim of right to condemn, independent of any view that the Court might hold in regard to an alleged Federal question.

The decision of the State Court would have been the same if the property that plaintiff is undertaking to appropriate instead of being owned by a public service corporation and devoted to a public use was a farm owned by an individual and devoted to the growing of potatoes. The alleged Federal question did not control the decision, and on that account this Court is without jurisdiction to entertain this case.

The views of this Court upon motions to dismiss for want of jurisdiction, based upon the ground that the alleged Federal question did not control the State Court, have been expressed in a multitude of cases.

In State *vs.* Board of Liquidation of Louisana, 98 U. S. 140, the syllabus reads:—

> "It is not enough to give this Court jurisdiction over the judgments of the State Court if the record

should show that a Federal question was argued or presented to that Court for decision.

"It must appear that its decision was necessary to the determination of the cause and that it actually was decided, or that the judgment as rendered could not have been given without deciding it."

In Hale *vs.* Akers, 132 U. S. 554, the syllabus reads:—

"Where two defenses were made in the State Court, either of which if sustained barred the action, and one involved a Federal question and the other did not and the State Court sustained them both and gave its judgment for defendant, this Court will affirm the State judgment without considering the Federal question although it may have been erroneously decided."

These principles have been approved in a long line of decisions, including the following:—

Miller *vs.* Anderson, 150 U. S. 135;
Eustis *vs.* Bolles, 150 U. S. 362;
Arkansas Southern Railway *vs.* Griffith, 207 U. S. 275;
Gaar, Scott & Co. *vs.* Shannon, 223 U. S. 468;
Southern Pacific Co. *vs.* Schuyler, 227 U. S. 610;
Consolidated Turnpike Co. *vs.* Norfolk & O. V. R. Co., 228 U. S. 598;
Adams *vs.* Russell, 229 U. S. 354.

It seems inconceivable that plaintiff denies the soundness of this principle. In the brief filed on behalf of the plaintiff (page 20) an effort is made apparently to show that this case does not come within the scope of the above principle. The brief states that it is

"impossible to know the precise ground upon which the State Courts proceeded,"

but that plaintiff's Federal right must have been denied; and that

> "the only question before the Court was whether or not the plaintiff had a right to acquire the land that constituted a contract and property right;"

and that

> "the questions of corporate existence, right to appropriate, inability to agree and necessity for the appropriation, as well as the question as to the effect of the defendant's asserted devotion of the land to the public use, are but separate elements of that single ultimate question, *i. e.*, mere premises upon which the existence of the asserted Federal right is to be deduced."

Plaintiff apparently contends that it is a matter of no importance whether the State statutes require, as conditions precedent to the exercise of even an admitted right of eminent domain, that the plaintiff, undertaking to exercise that right, must first establish corporate existence, right to appropriate, inability to agree and necessity for appropriation. This position means, as stated on page 21 of plaintiff's brief:

> "In other words the Federal question was presented and must have been decided adversely to the plaintiff and the precise ground upon which the State Court based its denial is therefore immaterial."

Plaintiff overlooks the fact that the local questions are separate and distinct from the alleged Federal question and that the State Court might have held with the plaintiff on his alleged Federal question, and perhaps the Court of Appeals of Summit County did so hold, but the decision of that Court may have been, and perhaps was, based entirely upon any one or more of the local questions involved. Under these circumstances this Court will not take jurisdiction of the case.

Plaintiff relies apparently with confidence upon the following cases:—

Gaar, Scott & Co. *vs.* Shannon, 223 U. S. 468;
West Chicago Railroad *vs.* Chicago, 201 U. S. 506;
Cornell Steamboat Co. *vs.* Phoenix Construction Co., 233 U. S. 593;
St. Louis & Iron Mt. Railroad *vs.* McWhirter, 229 U. S. 265.

In each one of these cases the general principle cited above is fully recognized, but the Court held that the Federal question controlled the case and the decision of the State Court could not have been rendered without deciding it. It is along these lines, of course, that the present case is differentiated from the four cases last cited. The record gives reasonably satisfactory evidence that the State Court based its decision upon the purely local questions, although it may perhaps have also decided the alleged Federal question against plaintiff.

In order that a plaintiff in error may succeed in having this Court take and maintain jurisdiction of his case, the burden is upon him to establish that the Federal question which he alleges gives this Court a jurisdiction, controlled the decision of the State Court.

It is not necessary that the record should show that the decision of the State Court is based upon a purely local question in order to establish that this Court will not take jurisdiction. In cases where both local and Federal questions are presented and the record fails to show whether the decision is based upon one or the other, this Court will not resolve the case in favor of jurisdiction but, on the contrary, will refuse to take jurisdiction. Plaintiff in error must show by the record that the decision of the State Court was controlled by the Federal question, otherwise this Court will not take jurisdiction. This point was expressly ruled in State *vs.* Board of Liquidation of Louisiana, 98 U. S. 140, and in Hale *vs.* Akers, 132 U. S. 554, cited above, and the same point has been decided more recently in the other cases cited above, including particularly Adams *vs.* Russell, 229 U. S. 354.

III.

This Court has no Jurisdiction Because no Federal Question is Involved in this Case.

Plaintiff in error alleges that a Federal question is involved and on that account this Court has jurisdiction. For the purpose of considering this point we assume that the plaintiff is right in its contention that under its charter, followed by the adoption of its plan of development, it acquired a contract or property right in the lands located in the valley of the Cuyahoga River needed for its development purposes, and we place to one side the undoubted fact that other questions of a purely local character sufficient to justify the decision of the State Court were involved in this case.

The plaintiff contends that a Federal question is involved on two grounds; (1) that its contract has been impaired, and (2), that it has been deprived of its property without due process of law.

In considering the first branch of this inquiry, we meet at the threshhold the elementary proposition that in order to bring a case within the jurisdiction of this Court, on the ground that a contract has been impaired, it must be shown that it was impaired by some legislative action subsequent to the creation of the contract. In Central Land Company *vs.* Laidley, 159 U. S. 104, the syllabus reads:—

> "In order to come within the provision of the United States Constitution, which declares that no State shall pass any law impairing the obligation of contract, not only must the obligation of the contract have been impaired, but it must have been impaired by some act of the legislative power of the State and not by a decision of its judicial department only."

To the same effect are the following cases:—

Bacon *vs.* Texas, 163 U. S. 207;

Loeb *vs.* Columbia Twp. 179 U. S. 479;

National Mutual B. & L. Assn. *vs.* Vrahan, 193 U. S. 635;

Cross Lake Shooting & Fishing Club *vs.* Louisiana, 224 U. S. 632;
Ross *vs.* Oregon, 227 U. S. 155.

Plaintiff evidently feels the necessity of showing that its contract was impaired by something in the nature of an exercise of legislative power. It endeavors to meet this burden by the claim that when defendants presented to the trial Court the proposition that plaintiff could not condemn their land as it had been already devoted to a public use, defendants relied upon the right of eminent domain, which must necessarily be founded upon legislative grant. Plaintiff devotes a substanial part of its brief to a consideration of the nature and extent of the right of eminent domain.

If there has been any impairment of plaintiff's contract it has been accomplished by the Court's judgment and not as the result of any legislative action. The Court did not sustain the validity of any constitutional provision, or act of the Legislature, or municipal ordinance against plaintiff's claim that such legislation impaired its contract right. Plaintiff does not attack any act of legislation on the ground that it impairs its contract. The only legislation that has any bearing upon the rights of the parties in this branch of the controversy are acts under which the several parties were incorporated, and the acts conferring the right of eminent domain. Plaintiff does not attack the validity of any of these acts. Plaintiff's contention is that defendants by asserting that they had devoted to a public use these lands, which they had theretofore purchased and not acquired by condemnation, in effect based its defense upon the right of eminent domain, which must necessarily be founded on legislative grant. The defense that the property which plaintiff was endeavoring to condemn had already been devoted to a public use, does not involve the assertion of the right of eminent domain, but even if it did, nothing is presented in the nature of a legislative act subsequent to the creation of plaintiff's alleged contract which can answer the requirements of the above principle of law, the burden of which plantiff is endeavoring to satisfy.

The second branch of this inquiry presents the question whether plaintiff has been deprived of its property without due process of law. This position when analyzed resolves itself into a claim that the State Court, in which plaintiff prosecuted his proceedings to condemn defendants' lands, and which admittedly had jurisdiction to hear and determine the issues raised, decided those issues against plaintiff's contentions and plaintiff wants this Court to reverse the State Court's decision. Plaintiff had ample opportunity to be heard in support of his contentions in the State Court, in fact the proceedings were instituted by plaintiff.

As was said in the opinion in Grannis *vs.* Ordean, 234 U. S. 394:—

> "The fundamental requisite of due process of law is the opportunity to be heard. Louisville & N. R. Co. *vs.* Schmidt, 177 U. S. 230, 236, 44 L. ed. 747, 750, 20 Sup. Ct. Rep. 620; Simon *vs.* Craft, 182 U. S. 427, 436, 45 L. ed. 1165, 1170, 21 Sup. Ct. Rep. 836. And it is to this end, of course, that summons or equivalent notice is employed."

A situation similar to the one presented in this case was presented in Macdonald *vs.* Oregon R. & N. Co., 233 U. S. 266, where the railroad company endeavored to enjoin defendants from interfering with its right of way. It appeared that defendants had conveyed the right of way to the railroad subject to a condition that the road should be completed within a definite time and the condition was not performed. On this account the defendants claimed that the railroad company's title had been forfeited and that they were the owners of the right of way. The State Court found in favor of the forfeiture but, having jurisdiction of the case, held that as the road was at the time in operation and serving the public, the defendants should not be allowed to take possession of the right of way but should be awarded proper damages, and thereupon the Court awarded the damages to the defendants and the right of way to

the railroad company. The defendants contended that this decree deprived them of their property without due process. The basis of the decree was that the railroad company had the right of eminent domain. This presents the same question that plaintiff claims is presented in this case. This Court said:—

> "All the contentions as to Federal rights rest upon the assumption that the Court below denied due process of law when it entered the decree complained of and this is based upon the conception that the Court exceeded its jurisdiction and misconceived or wrongfully interpreted the evidence and thereby in effect, while recognizing the title of the plaintiffs in error, virtually deprived them of the right conferred by the State law of having a common law trial for the purpose of determining the questions that were required to be decided in the case by the exercise by the railroad company of the right of eminent domain, including, of course, the fixing of compensation to be paid for the taking and the damages incidental thereto. * * * It is elementary and needs no citation of authorities to show that the due process clause of the Fourteenth Amendment does not control methods of State procedure, or give jurisdiction to this Court to review mere errors of law alleged to have been committed by a State Court in the performance of its duties within the scope of its authority concerning matters non-Federal in character."

Plaintiff argues in his brief (page 77), that although it instituted proceedings to condemn this land, the result of the Court's judgment has been that plaintiff's contract right has been impaired and it has been deprived of its property without due process of law. The contract which plaintiff claims has been impaired and its property of which it claims it has been deprived without due process are its alleged right to condemn the defendants' land for its development

purposes. We have heretofore shown that plaintiff's claim that its contract has been impaired does not bring its case within the scope of the contract clause of the Federal constitution because the alleged impairment was not the result of subsequent legislation.

The only basis for the claim that plaintiff has been deprived of its property without due process is that under the Court's judgment plaintiff has received no compensation for the property which he alleges has been taken from him. Plaintiff apparently relies upon Chicago, B. & Q. R. Co. *vs.* Chicago, 166 U. S. 226, which holds that this Court has jurisdiction under the due process clause to review a decision of the highest Court of the State in a condemnation case where, although plaintiff in error was served with process and appeared, he was not awarded compensation for the taking of his property for public use. The Court held that the failure to pay or secure proper compensation amounted to denial of due process.

This authority might be in point if the defendants were condemning the plaintiff's property and secured a judgment in their favor without the award of any compensation to plaintiff for the property taken. This is not that kind of a case. The Court denied the plaintiff's right to condemn the defendants' property. It did not grant the defendant the right to condemn plaintiff's property without compensation. In this connection plaintiff has shown by its own testimony that even under the order of the State Court in this case no property has been taken from it. We have shown above that plaintiff presented to the trial Court the Von Schon plan of development as the plan which it proposed to carry out. That plan proposes the construction of the Gaylord dam at a point in the river above the land which plaintiff is endeavoring to condemn from defendants. The construction of that dam would cause damage to defendants for it would divert the ordinary flow of the river so that defendants would be deprived of their riparian rights. Under this plan of development plaintiff will not need the long, narrow strip of land one hundred feet wide on each

side of the center line of the river which it is endeavoring in this proceeding to condemn, in fact, it will not need any of the defendant's land at all. If defendants are willing to forego their right to enjoin plaintiff from consummating this plan on the ground that under the statutes of the State plaintiff has no right to divert the water of the river in the way contemplated by the plan, plaintiff, instead of needing any of the defendant's property, would be under the burden of paying damages to the defendants for depriving them of the ordinary flow of the river.

There is no doubt that the State had authority to authorize the courts to deny the right to condemn to any party where the property which said party proposes to condemn has already been devoted to public use. As a matter of fact this is a general principle of law and if it be true, as alleged by the plaintiff, that the State Court acted upon it in this case, it does not follow that a Federal question is presented. On the contrary plaintiff's position resolves itself into nothing more than a charge that the decision of the State Court was erroneous.

In DeBearn *vs.* Safe Deposit & T. Co., 233 U. S. 34, this Court said:—

> "Briefly speaking, it is to be observed that the error which in this and the previous cases underlies all the assumptions of Federal right arises from disregarding the distinction between a controversy as to whether the attachments were authorized by the law of the State and the contention as to the power in the State to have given authority to its courts to issue such attachments. The two are widely different, the one being concerned with what State action has been taken and the other with the power of the State to confer authority to take such action. Castillo *vs.* McConnico, 168 U. S. 674."

In Willoughby *vs.* Chicago, 235 U. S. 48, the second point in the syllabus reads:—

> "Whether the State could, not whether it did authorize the procedure followed below, is ordinarily the

only question open for consideration by the Federal Court under writ of error to a State Court which attacks the validity under the Federal Constitution of the assessment for benefits resulting from the widening of the street."

This case really falls within that class of cases where a motion to dismiss is sustained on the ground that the Federal question suggested is wholly frivolous and unsubstantial and not adequate to give jurisdiction.

Consolidated Turnpike Co. *vs.* Norfolk & O. V. R. Co., 228 U. S. 598.

Under the circumstances outlined above, and considering the case in the light most favorable to plaintiff, there is no basis for its contention that it has been deprived of any property without due process of law.

Plaintiff argues at length in its brief the following questions:—

1. That its property has been taken (pages 49-51).

2. That its property has been taken for a private use and by a dummy of the Northern Ohio Traction Company (pages 55-69).

3. That its property has been taken without the necessary condemnation proceedings for which the statutes of the State provide (page 70).

4. That property can be devoted to public use only by the State or some instrumentality exercising delegated legislative authority (page 92).

5. That the property has not been legaliy devoted to public use pursuant to the power of eminent domain (pages 101-108).

6. That the defendants have no right to condemn the land which they claim has been devoted to public use (pages 108-110).

7. That plaintiff has the right to condemn this land even though it has been devoted to public use (pages 111-123).

All of these questions are interesting, but there is not a Federal question in the list. They are all questions for the determination of the State Court and this Court has no jurisdiction to review its decision of any of them.

For the reasons hereinbefore set forth we respectfully submit that this motion to dismiss this writ of error or to affirm the judgment should be sustained.

JOSEPH S. CLARK,
JOHN C. WEADOCK,
TOLLES, HOGSETT, GINN & MORLEY,
Attorneys for Defendants in Error.

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No. 342.

OCTOBER TERM, 1916.

IN THE

Supreme Court of the United States.

THE CUYAHOGA RIVER POWER COMPANY,
Plaintiff-in-Error,

AGAINST

THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION AND LIGHT COMPANY,
Defendants-in-Error.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

BRIEF FOR DEFENDANTS-IN-ERROR REPLY ON MOTION TO DISMISS OR AFFIRM.

JOSEPH S. CLARK,
JOHN C. WEADOCK,
T. H. HOGSETT,
Attorneys for Defendants-in-Error.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916. No. 342.

The Cuyahoga River Power Company, Plaintiff in Error,

against

The Northern Realty Company and The Northern Ohio Traction and Light Company, Defendants in Error.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

BRIEF FOR DEFENDANT IN ERROR.

REPLY ON MOTION TO DISMISS OR AFFIRM.

Defendants in error (hereinafter called "defendants") filed a motion to dismiss for want of jurisdiction or to affirm and filed a brief in support of that motion. Plaintiff filed its brief in opposition to this motion and the motion was presented on April 16th, 1917. On April 23d, the Court ordered the cause on the summary docket and assigned it for hearing on May 7th, 1917.

In order that the Court may understand the history of the case, the following chronological statement of the facts is presented:—

NOVEMBER 24, 1897.

The Akron, Bedford and Cleveland Railroad Company secured a report on the water power at Cuyahoga Falls where the property, which plaintiff is endeavoring to condemn is located. (See defendants' Exhibit L, Record, page 143.)

DECEMBER 14, 1897.

The Akron, Bedford and Cleveland Railroad Company purchased this property and took title in the name of Henry A. Everett (see deed, Record, page 118). This property was purchased for the purpose of water power development. (See testimony of Fred S. Borton, Record, page 61.)

MAY 26, 1899.

Agreement of consolidation of Akron Traction and Electric Company with Akron, Bedford and Cleveland Railroad Company under the name of Northern Ohio Traction Company. (See defendants' Exhibit E, Record, page 202.)

NOVEMBER 12, 1902.

Articles of Incorporation of the Northern Ohio Traction and Light Company. (Record, page 141.)

DECEMBER 29, 1902.

Deed from Northern Ohio Traction Company to Northern Ohio Traction and Light Company. (Record, page 172.)

OCTOBER 8, 1906.

Resolution of the Board of Directors of the Northern Ohio Traction and Light Company looking to the development of the property. Work was done from time to time in the way of reports of engineers. (Testimony of C. F. Moore, Record, pages 67-68.)

1897 TO 1910.

Various taxes and other payments made from time to time by the Akron, Bedford and Cleveland Railroad Com-

pany and the Northern Ohio Traction Company on account of this property. (See testimony of Charles H. Lahr, Record, page 83.)

1908.

Plaintiff was organized and in December adopted the Von Schon plan of development. (Record, pages 249-282.)

FEBRUARY 25, 1910.

Resolution of the Board of Directors of the Northern Ohio Traction and Light Company to purchase fifty-seven additional acres of land and to construct the new power plant on this property. (Record, page 69.)

DECEMBER, 1910.

Active work commenced by the Northern Ohio Traction and Light Company in the construction of its plant on this property. (See testimony of W. H. Roberts, pages 90-91; also testimony of Charles Currie, Record, pages 77-78; also minutes of meeting of the board held December 30th, 1910, Record, page 69.)

DECEMBER 20, 1910.

Deed from Henry A. Everett to Northern Realty Company. (Record, page 122.)

JANUARY 20, 1911.

This suit was instituted against the Northern Realty.

JANUARY 31, 1911.

Deed from Northern Realty Company to Northern Power Company. (Record, page 147.)

FEBRUARY 24, 1914.

Deed from Northern Power Company to Northern Ohio Traction and Light Company. (Record, page 151.)

MARCH 20, 1914.

The trial of this case commenced in the Court of Common Pleas and Northern Ohio Traction and Light Company on its own motion was admitted as a party defendant.

STATEMENT OF CASE AND QUESTIONS INVOLVED.

Plaintiff sued to condemn defendants' land. It lost in the trial Court, that is, the Court of Common Pleas of Summit County, Ohio, and lost again on writ of error to the Court of Appeals of Summit County. It took the case by writ of error to the Supreme Court of Ohio and again lost. Plaintiff has brought the case here by writ of error to the Court of Appeals of Summit County.

Plaintiff claims that this Court has jurisdiction on the ground that a Federal question is involved and that that question controlled the decision of the State Court.

Plaintiff was incorporated under the appropriate Incorporation Act of the State of Ohio to develop the water power of the Cuyahoga River between specified points. It claims that under its charter and the laws of the State of Ohio it has the right of eminent domain and that that right is a contract right and a property right and that this contract right has been impaired and that it has been deprived of this property right without due process of law. It appeals to this Court for protection under the contract impairment clause of the Federal Constitution and the due process clause of the Fourteenth Amendment.

The Act which plaintiff claims impairs its contract right and deprives it of its property without due process is the judgment of the State Court which denies plaintiff's right to condemn defendants' land. One of the defenses presented by defendants was that plaintiff could not condemn this land as they (defendants) had already devoted the property to a public use. Plaintiff claims that the judg-

ment of the Court denying its right to condemn was based upon this defense and that this defense was necessarily based upon an exertion of the legislative power of the State for the reason that no property, according to plaintiff, can be devoted to public use except by exercise of the right of eminent domain. Defendants did not acquire this property by condemnation, but purchased it. Plaintiff's contention, however, is that although the property was purchased by defendants, it could only devote it to a public use by exercise of the right of eminent domain, which it alleges is equivalent to an exertion of the legislative power of the State, and that this situation presents a case within the scope of the contract impairment clause of the Federal Constitution.

Plaintiff further claims that the judgment of the State Court in denying its right to condemn defendants' land deprives it of its property without due process, first, because no compensation is paid, and second, because its property has been taken for a use which plaintiff claims is not a public use but, on the contrary, is a private use.

Defendants' motion to dismiss or affirm presents the questions whether the writ of error was addressed to the right Court; whether the alleged federal question controlled the case; and whether any federal question is in fact involved.

The first question has already been fully ventilated in the briefs heretofore filed and we will have nothing further to say on that point in this brief. We will, however, have something to say on the other two questions in reply to the brief filed by plaintiff in opposition to defendants' motion to dismiss, that is:—

1. Did the alleged Federal question control the decision of the State Court; and

2. Is any Federal question involved in the case?

If the motion to dismiss is overruled, it will mean that there is a Federal question involved and that it controlled the decision of the State Court. On this hypothesis this Court will be called upon to consider the following two

questions which defendants contend are really separate and distinct local questions justifying and requiring this Court to sustain defendants' motion to dismiss, to wit:—

3. Did plaintiff show inability to agree with defendants before instituting this condemnation suit; and

4. Did plaintiff show any necessity for appropriating defendants' land?

The following propositions will also be presented:—

5. Plaintiff's right to condemn is not a right entitled to the protection of the Federal Constitutional Guarantees.

6. Had not defendant devoted this proverty to public use and, independent of all other questions, was not that a good defense?

ARGUMENT.

I.

Did the Alleged Federal Question Control the Decision of the State Court?

The alleged Federal question is fully stated above. There appears to be an important issue between the parties in regard to the real nature and scope of plaintiff's alleged Federal right. In the brief filed for plaintiff in opposition to defendants' motion to dismiss, plaintiff's contract right and property right are constantly spoken of as a Federal right. This right is plaintiff's right of eminent domain, which is based solely upon the State Constitution and statutes and plaintiff's State charter. There is nothing Federal about it, in and of itself. It is not founded in any respect upon the Federal Constitution or any Federal statute. It is distinctly a State right. It is none the less entitled to protection under both the contract impairment clause and the due process clause of the Federal Constitution. In order to establish the jurisdiction of this Court plaintiff must show that this State contract right has been

impaired, or that it has been deprived of this State property right without due process. The fact that the State refused to allow condemnation does not of itself establish that plaintiff's contract has been impaired or that it has been deprived of its property without due process. Plaintiff called defendants into the State Court and invoked the powers of that Court to enforce its right to condemn. Defendant did not deny the existence of plaintiff's right of eminent domain under its charter and the Constitution and laws of the State of Ohio, but did deny its right to condemn defendants' land. The burden was imposed upon plaintiff to show inability to agree as to the compensation to be paid for the property, also the necessity for the appropriation. Defendant further relied upon its own devotion to public use of the property which plaintiff sued to condemn. Suppose plaintiff had made no effort to show inability to agree and defendant had moved to dismiss on that ground and the trial Court had sustained that motion and the judgment of the trial Court had been affirmed? According to the plaintiff's argument, this Court could take jurisdiction on writ of error. Or suppose plaintiff at the trial had failed to show any necessity for the appropriation and defendant had moved to dismiss on that ground and that judgment had been affirmed? Or supppose that plaintiff had failed to *establish* the first point required by the statute, to wit, the existence of the corporation, although it was in fact regularly incorporated, or suppose that the service upon the defendants was defective? Is it possible that in any one of these cases this Court could take jurisdiction upon writ of error to the State Court? If the State Court decided the case against plaintiff on any one of the points mentioned, its judgment would not be an impairment of plaintiff's contract right, or deprive plaintiff of its property right without due process, although that judgment would necessarily deny plaintiff's State right to condemn defendants' land.

In plaintiff's brief in opposition to our motion to dismiss (page 33) counsel said:—

> "And the question of its right to make the appropriation is conceded to be Federal."

To sustain this statement reference is made to our brief on motion to dismiss (page 11). No such concession is made in our brief. Counsel evidently refers to the following statement which appears on page 11:—

> "The alleged Federal question arises out of point 2 mentioned above, to-wit, its right to make the appropriation."

We do concede that the alleged Federal question arises out of that point, for the alleged right to make the appropriation is defendants' alleged right to condemn, of which plaintiff claims it has been deprived without due process, because of the defense that defendant had already devoted this property to a public use. It is not true that we concede that plaintiff's alleged right of condemnation, or its alleged right to make the appropriation is a Federal question; in fact, we expressly deny that it has anything Federal about it. Plaintiff's claim that this right is a contract right and that it has been impaired raises the Federal question and plaintiff's further claim that this right is a property right and that it has been deprived of this property without due process raises a Federal question.

Many of the questions that are presented and argued in the briefs heretofore filed by plaintiff were considered and analyzed in the recent case of Enterprise Irrigation District, *et al. vs.* Farmers Mutual Canal Co. *et al.*, decided March 6th, 1917, Advance Opinions of April 15th, 1917, page 318. The case came from the Supreme Court of the State of Nebraska. Plaintiffs in error denied the right of a certain canal company to divert a certain amount of water into its canal from the North Platte River for purposes of irrigation. The Court said:—

> "Concisely stated, the assignments of error complain that the Supreme Court infringed the due process and

equal protection provisions of the Fourteenth Amendment, first, by giving decisive effect to the State Board's decision, instead of holding that it was made without lawful notice or opportunity to be heard, and therefore was void, and, second, by misconceiving or misapplying the statute and common law of the State in disposing of other questions.

"Our jurisdiction is disputed and must be considered, as, indeed, it should be, even if not challenged. As has been shown, several questions were presented to the Supreme Court and all were considered. One was whether the State Board's decision could be given any conclusive effect consistently with the due process and equal protection clauses of the Fourteenth Amendment, and another was whether the defense of estoppel in *pais* was well grounded. The first was plainly a Federal question and the other as plainly non-Federal. Both were resolved in favor of the canal company. The other questions, none of which was Federal, may be put out of view in this connection. Thus we are concerned with a judgment, placed upon two grounds, one involving a Federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-Federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any Federal question and we have no power to disturb it. Hammond *vs.* Johnston, 142 U. S. 73, 78, 35 L. ed. 941, 942, 12 Sup. Ct. Rep. 141; Eustis *vs.* Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Berea College *vs.* Kentucky, 211 U. S. 45, 53, 53 L. ed. 81, 85, 29 Sup. Ct. Rep. 33; Waters-Pierce Oil Co. *vs.* Texas, 212 U. S. 112, 116, 53 L. ed. 431, 433, 29 Sup. Ct. Rep. 227; Gaar, S. & Co. *vs.* Shannon, 223 U. S. 468; 56 L. ed. 510, 32 Sup. Ct. Rep. 236; Southern P. Co. *vs.* Schuyler, 227 U. S. 601, 610, 57 L. ed. 662, 668, 43 L. R. A. (N. S.) 901, 33 Sup. Ct. Rep. 277. It

has been so held in cases where the judgment was rested upon a Federal ground and also upon an estoppel. Pierce *vs.* Somerset R. Co., 171 U. S. 641, 648, 43 L. ed. 316, 319, 19 Sup. Ct. Rep. 64; Lowry *vs.* Silver City Gold & S. Min. Co., 179 U. S. 196, 45 L. ed. 151, 21 Sup. Ct. Rep. 104, 21 Mor. Min. Rep. 113. But where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain. See Moran *vs.* Horsky, 178 U. S. 205, 208, 44 L. ed. 1038, 1039, 20 Sup. Ct. Rep. 856; Creswill *vs.* Grand Lodge K. P. 225 U. S. 246, 261, 56 L. ed. 1074, 1080, 32 Sup. Ct. Rep. 822."

"And this is true also where the non-Federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the Federal question. Leathe vs. Thomas, 207 U. S. 93, 99, 52 L. ed. 118, 120, 28 Sup. Ct. Rep. 30; Vandalia R. Co. *vs.* Indiana, 207 U. S. 359, 367, 52 L. ed. 246, 248, 28 Sup. Ct. Rep. 130. But, where the non-Federal ground has fair support, we are not at liberty to inquire whether it is right or wrong, but must accept it, as we do other State decisions of non-Federal questions. Murdock *vs.* Memphis, 20 Wall. 590, 635, 22 L. ed. 429, 444; Eustis *vs.* Bolles, 150 U. S. 369, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Leathe *vs.* Thomas, *supra;* Arkansas Southern R. Co. *vs.* German Nat. Bank, 207 U. S. 275, 52 L. ed. 201, 203, 28 Sup. Ct. Rep. 78."

The Court then considered the question of estoppel in *pais* presented in the case and held that it was undoubtedly an independent ground of the judgment. The Court further said:—

"In view of the facts before recited we think it cannot be said that the ruling upon the question of estoppel

is without fair support, or so unfounded as to be essentially arbitrary, or merely a device to prevent a review of the other ground of the judgment. We therefore are not at liberty to inquire whether the ruling is right or wrong. * * * It is not urged, nor could it well be, that, as a ground of decision, the estoppel is not broad enough to sustain the judgment."

"The claim that the Court, in disposing of some of the questions, including that of the estoppel, misconceived or misapplied the statutory and common law of the State, and thereby infringed the due process and equal protection clauses of the Fourteenth Amendment, requires but brief notice. The due process clause does not take up the laws of the several States and make all questions pertaining to them constitutional questions, nor does it enable this Court to revise the decisions of the State Courts upon questions of State law. Sayward *vs.* Denny, 158 U. S. 180, 186, 39 L. ed. 941, 943, 15 Sup. Ct. Rep. 777; Central Land Co. *vs.* Laidley, 159 U. S. 103, 112, 40 L. Ed. 91, 94, 16 Sup. Ct. Rep. 80; Castillo *vs.* McConnico, 168 U. S. 674, 683, 684, 42 L. ed. 622, 625, 626, 18 Sup. Ct. Rep. 229. The questions presented, other than those relating to the validity of the State Board's adjudication, all turned exclusively upon the law of the State, and the State Court's decision of them is controlling. Preston *vs.* Chicago, 226 U. S. 447, 57 L. ed. 293, 33 Sup. Ct. Rep. 177; St. Louis & K. C. Land Co. *vs.* Kansas City, 241 U. S. 419, 427, 60 L. ed. 1072, 1077, 36 Sup. Ct. Rep. 647; Old Colony Trust Co. *vs.* Omaha, 230 U. S. 100, 116, 57 L. ed. 1410, 1416, 33 Sup. Ct. Rep. 967."

In the case before us, the question whether the plaintiff proved inability to agree and the further question whether it proved necessity for the appropriation are just as separate and distinct from the alleged Federal question as was the question of estoppel in this Mutual Canal Company case. They are not in any sense so interwoven with the alleged Federal question as not to be independent matter, and they

are of sufficient breadth to sustain the judgment without any decision on the alleged Federal question. There is no basis for the suggestion that they are essentially arbitrary or mere devices to prevent a review of the alleged Federal question, and they have more than fair support by the record. Moran *vs.* Horsky, 178 U. S. 205 is cited in the above quotation in support of the proposition that where a Federal question is so interwoven with a non-Federal question as not to be independent matter, the jurisdiction of this Court is plain. The law is stated to that effect in the opinion, but the non-Federal defense in the case was laches, and it was held that this defense "is based on a ground independent of any Federal question. On this account the jurisdiction was denied, and the writ of error was dismissed.

The defense of laches was presented in Creswill, *et al.*, *vs.* Grand Lodge K. of P., 225 U. S. 248, which is also cited at the same place in the above quotation, and that defense was sustained by the State Court, but this Court reversed the judgment, as it found no evidence to sustain this defense. This Court said: "While it is true that upon a writ of error to a State Court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (*a*) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support and the evidence is in the record, the resulting question of law is open for decision." Laches is undoubtedly an independent non-Federal question, but it must have some support in the evidence.

Res adjudicata is held to be an independent non-Federal question, Wood *vs.* Chesborough, 228 U. S. 673. In Arkansas S. R. Co. *vs.* German National Bank, 207 U. S. 273, the State Court directed judgment against the Railroad Company for delivering cotton without surrender of the bill of lading, basing its decision on a statute which plaintiff in error contended was unconstitutional as a regulation of interstate commerce, but also upon certain principles

of common law. This Court dismissed the writ of error as the latter basis for the judgment presented a separate non-Federal question.

The statute of limitations is held to be a separate non-Federal question, and even though there may be a Federal question involved this Court will refuse jurisdiction. Johnson *vs.* Risk, 137 U. S. 300. These cases might be multiplied indefinitely.

In Stanley *vs.* Schwalby, 162 U. S. 257, and in C. B. & Q. R. Co. *vs.* Illinois, 200 U. S. 580, there was no independent non-Federal question broad enough to justify the decision of the State Court, and the denial of the Federal right was based on a question of law. Therefore, both cases were reviewable in this Court.

Plaintiff's error consists in considering its right of condemnation itself as a Federal question involving as separate elements, but as parts of the right itself, the statutory preliminary conditions precedent, that is the existence of the corporation, inability to agree, necessity for the appropriation, and right to appropriate. The right to appropriate is the right to condemn. This does not include the other elements, or rather conditions precedent, to the exercise of the right, which are separate and independent questions. If it did, why should these other questions be mentioned. They are, all of them independent non-Federal questions.

Although the Mutual Canal Company case covers a number of questions that have been argued in the briefs in the case before us, it does not touch perhaps the most important point, which is that in our case no opinion was filed in any of the State Courts, so that we cannot know definitely whether the decisions in the State Courts were based on the alleged Federal question, or on some of the local questions presented in the Record. We are not left entirely in the dark in this matter for the Record shows the motion to dismiss for the reasons therein stated, made by counsel or the defendants at the end of the trial (Record, page 232), and the proceedings which follow that motion, all of which

are considered in our brief on motion to dismiss (pages 9-10). The principles adopted by this Court in cases of this kind are well understood. We agree with much that is said on this question in plaintiff's brief in opposition to our motion to dismiss (pages 25-32). In fact, we rely on all of the cases cited by plaintiff in these pages. It is quite clear that where the Record in the State Court shows that a Federal question and a non-Federal question were presented, but the decision of the Court does not show whether it was based upon either one or the other, and this Court is left to conjecture the basis of the decision and the two questions are not so intervoven that they cannot be separated and considered as independent and separate questions, this Court will examine the Record to see whether the non-Federal question is sufficient of itself to sustain the judgment of the State Court without reference to the Federal question and is a good and valid defense. We agree that this Court must determine this issue but, in determining whether the non-Federal question is a good and valid defense, this Court will not analyze and consider conflicting testimony on an issue of fact which is fairly presented by the Record. If the Record shows an issue of fact, and there is evidence to sustain the judgment of the State Court on the theory that it was based on the non-Federal question, this Court will refuse to take jurisdiction. If the Record presents a question of law in connection with a non-Federal question, this Court will examine to see whether the judgment of the State Court could be sustained on that basis.

The non-Federal questions presented in the present case are whether plaintiff proved inability to agree with defendant as to the compensation to be paid for the property, and whether plaintiff established necessity to appropriate the property. On the first question the Record shows very clearly that the plaintiff was advised of the fact that the property was owned by the Northern Ohio Traction and Light Company and yet, with this knowledge, commenced to negotiate with the Northern Realty Company for the purchase of this property on January 16th, 1911. On that

day plaintiff wrote two letters, each addressed to the Northern Realty Company, making two separate offers for the property, the first for an absolute purchase and the second with a reservation of an easement or privilege to the Northern Realty Company. These two letters appear as defendants' Exhibits C and D (Record, pages 199 and 200). The testimony of the witnesses Willis Bacon (Record, page 45), and Richard F. Palmer (Record, page 53), called by plaintiff, establishes that there was some discussion between the representatives of the plaintiff and the representatives of the Northern Realty Company between January 16th and 20th, 1911, the principle conference being held on January 20th, the day on which this suit was instituted. Plaintiff makes much of the fact that the witness, Charles Currie, who was the vice-president and general manager of the Northern Ohio Traction and Light Company, took some part in this discussion. Mr. Bacon was asked (page 47), whether he was talking to Mr. Currie because he represented the Northern Ohio Traction and Light Company, and he answered "No." Negotiations to purchase the land commencing on January 16th and ending on January 20th, and a petition in condemnation filed on the latter date shows that there was not very much time given to these negotiations, in fact not enough to have the question presented to and considered by the Board of Directors of either the owner, the Northern Ohio Traction and Light Company, or the holder of the legal title, the Northern Realty Company. This fact of itself may have impressed the trial Judge with sufficient force to have caused him to render judgment against the plaintiff.

In the brief filed for plaintiff in opposition to defendants' brief on motion to dismiss (page 48) counsel for plaintiff calls attention to the fact that although Mr. Currie was called as a witness for defendants, he was not asked a single question with respect to his conversation with Mr. Bacon. The burden of establishing inability to agree rested upon plaintiff. Mr. Currie was not only called as a witness by defendants, but was cross exam-

ined by plaintiff, and no questions were asked him in regard to these discussions or negotiations upon which plaintiff relies to establish its inability to agree in regard to the compensation to be paid for the land. In this condition of the evidence a decision by the State Court that plaintiff had failed to establish inability to agree would be fully justified. As suggested above, the attention of the trial Judge was expressly drawn to this particular question by the motion to dismiss, which appears at page 232 of the Record. Counsel for defendants asked the Court to dismiss plaintiff's petition

> "for the reason that there is no evidence proving that there was any attempt or failure to agree with the owner of the property before beginning the proceeding for the appropriation of the property described in the petition, and that the plaintiff has no right to appropriate the property described in the petition."

It is not clear whether counsel for defendants meant by the last part of his motion that for the reason mentioned, to wit, failure to prove any attempt or failure to agree, plaintiff "has no right to appropriate the property," or whether by the latter part of his motion counsel meant that under all of the evidence covering the several points of defense "plaintiff has no right to appropriate the property." It may be that this motion to dismiss should be construed to cover not only the defense that plaintiff had failed to prove inability to agree, but also had failed to prove necessity for the appropriation, and also that plaintiff had no right to appropriate because defendant had already appropriated the property to a public use. Whichever way this motion is construed, it is clear that the attention of the trial Judge was expressly called to this independent non-Federal question, to wit, whether plaintiff had established inability to agree. It is further clear that the record shows an attempt by plaintiff to prove inability to agree and an attempt by defendants to show that no sufficient effort had been made by plaintiff in this respect to

meet the requirements of the statute. This Court will not analyze and construe the evidence in a case of this kind. This Court will do no more than determine that this independent non-Federal question is broad enough to justify the decision of the State Court and is a good and valid defense, and that the trial Judge would have been justified, under the evidence presented, to sustain defendants' contention on this point.

On the other non-Federal question, to wit, necessity to appropriate, the record is perfectly clear. Under plaintiff's plan of development, defendants' property is not needed. Plaintiff proposes to construct the Gaylord Dam at a point on the river above defendants' property. This will injure defendants' property because it will deprive defendants of the ordinary flow of the river, but it does not appear that defendants' property will be needed for the construction of any of plaintiff's proposed improvements. In plaintiff's brief in opposition to our motion to dismiss (pages 53 to 55) counsel argues that as the construction of the Gaylord Dam will damage defendants' property by depriving it of the water, plaintiff is justified in condemning and, by that means, taking title to defendants' property, and that plaintiff's arbitrary description of the property which it is to take, that is, 100 feet on each side of the channel of the river, is justified. In this condition of the evidence it is perfectly clear that the decision of the trial Judge to the effect that plaintiff has failed to establish necessity to appropriate would be fully justified. We cannot know whether the Court based its judgment on this proposition but, in view of the fact that the evidence would have justified the judgment on that basis, this Court will not take jurisdiction on any theory that this independent non-Federal question was not a valid and good defense and sufficient to sustain the judgment.

On this branch of the case plaintiff relies apparently with confidence (brief in opposition to motion to dismiss, page 30), on Johnson *vs.* Risk, 137 U. S. 300. The syllabus reads as follows:—

"1. To give this Court jurisdiction to review a judgment of a State Court, it must appear affirmatively, not only that a Federal question was presented therein for decision to the highest Court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

"2. Where in a suit from a State Court there is a Federal question, but the case may have been disposed of on some other independent ground, and it does not appear on which of the two grounds the judgment was based, then if the independent ground was not a good and valid one, sufficient of itself to sustain the judgment, this Court will take jurisdiction of the case.

"3. Where a defense in a State Court is distinctly made, resting on local statutes, this Court will not, in order to reach a Federal question, resort to critical conjectures as to the action of the Court in the disposition of such defense.

"4. Where in a suit in a State Court there is a Federal question, and also a ground under the State Statute of Limitations on which the judgment is sustainable, and it does not appear on which of the two grounds the judgment was based, this Court has no jurisdiction to review the judgment."

The Court said:—

"Was the defense of the Statute of Limitations so palpably unfounded that we must presume that the State Court overruled it?"

The non-Federal question raised a point of law under the Statute of Limitations and this Court examined that point of law to see whether it was well taken. This is vastly different from an examination by this Court of conflicting testimony upon a question of fact relating to an independent non-Federal question where the burden of proof rests upon

the plaintiff. In this case, at the end of the opinion, we also find the following:—

> "Inasmuch, therefore, as, if the Supreme Court of the State had sustained the defense of the Statutes of Limitation, we cannot perceive that such decision would have been erroneous, it does not appear that the judgment as rendered could not have been given without deciding the Federal question, or that its decision was necessary to the determination of the cause and that it was actually decided."

Plaintiff also relies on the leading case of Klinger *vs.* Missouri, 13 Wallace 257. We quote the following from the opinion in this case, which is the latter part of the quotation from the same opinion appearing on page 28 of plaintiff's brief in opposition to our motion:—

> "But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this Court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the State Court based its judgment on the law raising the Federal question, and this Court will then take jurisdiction." (Citing a number of cases.)

In this case a juror was discharged counsel asking for his discharge, presenting two reasons, one Federal and the other non-Federal. The Judge discharged the juror, but did not specify whether he based his decision upon one point or the other. This Court held that it would not take jurisdiction in view of the fact that the non-Federal ground was a good and valid ground and the trial Judge might have discharged the juror on that ground.

Of course the issue is to what extent this Court will go in determining whether the non-Federal question is a

good and valid defense. Where a non-Federal ground involves a question of fact and there is fair support in the evidence and the Court may have rested its decision upon this ground, this Court will not take jurisdiction.

Plaintiff, in order to sustain its contention that in cases of this kind this Court will examine into and review the testimony in order to determine an issue of fact where there is conflicting evidence, cites a number of cases, including the following:—

> Kansas City S. R. Co. *vs.* C. H. Albers Commission Co., 223 U. S. 584;
> Cedar Rapids Gas Light Co. *vs.* Cedar Rapids, 223 U. S. 666;
> Creswill *vs.* Grand Lodge K. of P., 225 U. S. 246;
> Southern P. Co. *vs.* Schuyler, 227 U. S. 601;
> Bowe *vs.* Scott, 233 U. S. 658;
> Carlson *vs.* Curtis, 234 U. S. 103.

In each one of these cases the first question considered by this Court was whether a Federal question was presented. In no one of them was it suggested that, in addition to an alleged Federal question, a non-Federal question was presented. In each case this Court, having decided that a Federal question was presented, proceeded to consider to what extent it would examine the facts. In some of the cases the records showed findings of fact. As a general proposition

> "this Court does not sit to retry issues of fact thus heard and determined by the properly constituted tribunals of the State having jurisdiction of the subject." Portland R. L. & P. Co. *vs.* Railroad Commission, 229 U. S. 400.

but as stated in Kansas City S. R. Co. *vs.* C. H. Albers Commission Co., 223 U. S. 591:—

> "While it is true that upon a writ of error to the State Court we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the Federal right set up by the unsuc-

> cessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter."

These authorities have no bearing upon the issue presented in this branch of this case. They do not sustain plaintiff's apparent contention that even upon the supposition that separate and distinct non-Federal questions are presented, this Court will examine conflicting testimony in order to reach its own conclusion on the question whether a decision on any such non-Federal question in favor of a successful party in the State Court was justified.

It seems reasonably clear that in cases where a Federal question and a non-Federal question are presented to the State Court, and the decision does not show the basis upon which the State Court entered its judgment or decree, this Court will determine whether the non-Federal question is broad enough to cover the case and justify the decision without reference to the Federal question and whether it is a good and valid defense; and in deciding that question, if a point of law is presented this court will consider it and determine whether it is "so palpably unfounded that we must presume that the State Court overruled it." (Johnson *vs.* Risk, 137 U. S. 300). But the Court will not review pure questions of fact although where a Federal right is denied by the State Court and the decision is based on a mixed finding of law and fact or where it is charged that there is no evidence to support the finding this Court will examine the evidence. Judged by the principles established by the authorities, the defense in this case of inability to agree and no necessity for the appropriation with the burden of proof resting upon the defendants, must be considered not only independent non-Federal questions, but broad enough to justify the decision and good and valid defenses.

II.

Is Any Federal Question Involved in this Case.

We concede, of course, that property cannot be taken from its owner for a public use without just compensation, nor can it be taken for a private use and, further, than an issue of this kind presents a Federal question of which this Court will take jurisdiction upon writ of error to the highest State Court if the question is properly presented.

Section 237 of the Judicial Code is analyzed by plaintiff in its original brief, page 3, into three propositions, which are, in fact, copied from the opinion of this Court in Columbia W. Pr. Co. *vs.* Columbia Elec. St. R. R. & P. Co., 172 U. S. 474. The first proposition is:—

> (1)—Where is drawn in question the validity of a treaty or statute of or authority exercised under the United States, and the decision is against their validity.
>
> Plaintiff does not contend that this case comes within this class. (See original brief, page 4.)
>
> (3)—Or where any right, title, privilege, or an immunity is claimed under the Constitution or any treaty or statute of or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up and claimed by either party under such Constitution, statute, commission or authority.

Plaintiff claims that the present case comes within this class, but it seems reasonably clear that this is not true. The basis for plaintiff's contention in this regard is set forth on page 4 of its original brief, which contains the following:—

> "The denial of the plaintiff in error's right to acquire the land is a decision against the title, right, privilege or immunity specially set up and claimed by the plaintiff in error under the Constitution of the United States, and is thus within the third clause."

We have already shown that plaintiff's right of condemnation is not a title, right, privilege or immunity under the United States Constitution, but is based solely upon the Constitution and laws of the State of Ohio and its charter secured under those laws. That right may be entitled to protection under the contract impairment clause and due process clause of the Federal Constitution, but it is not a right based upon the Federal Constitution, although the plaintiff's right to protection is based on that Constitution. It seems quite clear that plaintiff's right, considered as a contract right, may be denied and in that sense impaired, but unless it can be shown that it is impaired by a subsequent act of legislation, plaintiff has no right to protection under the contract impairment clause of the Federal Constitution. Plaintiff's right, considered as a property right, may be denied and he may be deprived of it, but unless he has been deprived of it on some basis that evidences a lack of due process, he is not entitled to the protection of the Federal Constitution. For these reasons this third proposition, quoted above, has no application.

The second proposition is as follows:—

> "(2) Where is drawn in question the validity of a statute or of an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity."

Plaintiff contends that in this case there is drawn in question the validity of an authority exercised under the State of Ohio on the ground that it is repugnant to the Constitution, and that the decision is in favor of its validity. Plaintiff contends that the devotion to public use by defendant of the property in question is an exercise of an authority under the State; that it is an exercise of the right of eminent domain, and that the decision of the State Court is in favor of the validity of this authority. We contend that at this last point plaintiff's case breaks down. There

is nothing in the Record to show that the State Court sustained the validity of defendant's devotion of the property to public use. The burden is upon plaintiff to show that the case presents a decision of the State Court to that effect and there is nothing in the Record to sustain any such position.

In plaintiff's brief in opposition to our motion to dismiss, at pages 14 and 22, attention is called to our failure in our brief to mention plaintiff's suggestion that the Ohio Commission law must have been relied upon by defendant as a basis for its devotion of the property to public use, and that this act is a subsequent act of legislation, which in addition to the exercise of the right of eminent domain by defendant in devoting the property to public use, brings this case within the jurisdiction of this Court under the contract impairment clause of the Federal Constitution.

We did not mention this Ohio Commission Act for the reason that there is nothing whatever in the record to show any connection between it and defendant's devotion of the land to public use, and on that account we did not consider that the point required any answer. Plaintiff cites many cases in an effort to sustain its position that the exercise of the right of eminent domain is in the nature of a legislative act, and can properly act as a subsequent act of legislation within the requirement of the law relating to the contract impairment clause and justify the jurisdiction of this Court, but none of these cases sustain this position. We have heretofore discussed this question in our brief filed in support of our motion to dismiss.

III.

Did Plaintiff Show Inability to Agree with Defendants Before Instituting this Condemnation Suit?

This question has been pretty thoroughly ventilated under Point I, *supra*. We find difficulty in considering this question except as a separate and distinct non-Federal question. But if this Court should hold that a Federal question is in

fact presented and controls the case so that this Court has jurisdiction to hear and determine it on the merits, the point presented on this branch of the case is whether this Court will review the testimony where it expressly appears that this same testimony has been before the State Court and the question whether it establishes inability to agree was expressly presented to the State Court and that Court may have ruled upon that question in the light of this testimony. The State Court may, in fact, have determined that there was not time enough between January 16th and January 20th, 1911, either for the Realty Company, the nominal owner who held the legal title to the property, or the Traction and Light Company, the real owner, to have this question, that is, whether it or they would sell the property to the plaintiff, presented to and considered by their respective Boards of Directors. In this connection this same plaintiff lost its condemnation proceeding against certain other owners of lands in this same neighborhood for the reason that the "plaintiff's offers to purchase the lands of such other owners were invalid because such other owners were not given a sufficient time to consider them" (plaintiff's original brief, page 5). If this Court should refuse to sustain our motion to dismiss, we submit that our motion to affirm should be granted on this ground, to wit, that plaintiff failed to show inability to agree.

IV.

Did Plaintiff show any necessity for Appropriating Defendants' Land?

In considering this question upon the merits we refer to the argument presented in our brief in support of our motion to dismiss (pages 13-15). It seems very clear that under plaintiff's plan of development it will have no need for the property which it is endeavoring to condemn from defendants. A curious inconsistency is presented in the petition filed in the Circuit Court of Summit County where this suit was originally instituted (Record, pages 4-7),

and plaintiff's proof at the trial. In this petition (Record, page 5) we find the following:—

> "Plaintiff says that it is necessary and that it so deems it necessary in order to carry out the objects and purposes of this corporation that it shall appropriate, and it intends to appropriate, as a part of its right of way for the construction, maintenance and operation of its said system of dams, pole lines and power houses, canals, locks and raceways, and for the purpose of constructing, maintaining and operating thereon, a dam or dams across said river which will raise the water in the channel thereof on the lands hereafter described, and also a line of poles thereon along the banks of said river whereon to string wires or cables to convey electricity and such power houses and other necessary structures as may be required to carry out the purposes of its charter, the following de-described real estate, to wit:"

Then follows a description of the property which plaintiff proposes to condemn. On page 7 at the end of this same petition we find:—

> "Wherefore plaintiff asks that such steps may be taken as are authorized by law, whereby plaintiff will be enabled to appropriate the above described real estate for its uses, objects and purposes above set forth; that it may have a decree authorizing it to so appropriate said property," &c.

It would seem from these parts of the petition that plaintiff needed this property for dams and power houses and structures and pole lines and also that it was going to raise the water in the channel on these lands. Plaintiff's proof does not sustain these allegations. The testimony which is referred to on page 14 of our brief for motion to dismiss shows that plaintiff does not intend to construct any dam on this property or any power house or any other structure, and, in fact, does not propose to flood this land. Plaintiff's

plan involves the construction of the Gaylord Dam at a point higher up the stream. The construction of this dam instead of resulting in flooding defendants' land, or in any way making it necessary for plaintiff to possess defendants' land, will accomplish nothing except to deprive plaintiff of the ordinary flow of the stream. This follows because under the plan the water of the stream will not only be held back by this Gaylord Dam but, instead of being returned into the old channel of the stream below that dam, it is proposed to divert the water away from the old channel and into the Brandywine Basin. We suggested in our brief filed in support of our motion to dismiss that this would subject plaintiff to an action for damages by defendant based upon the diversion of the water from defendants' property. Plaintiff replies in his brief in opposition to our motion that, on this hypothesis, if plaintiff went ahead with its plan "without acquiring defendants' land it would be immediately stopped by injunction." This is presented as a reason in support of plaintiff's action to condemn the land itself, that is, plaintiff insists that it has the right to condemn the land in order that it might be relieved from an action for damages.

Plaintiff will be met with a much more serious action than one for damages if it undertakes to follow out the plan which has been adopted by its Board of Directors that is, the Von Schon plan, which involves the diversion of water from the channel of the Cuyahoga River into Brandywine Basin. There is no authority in the laws of the State of Ohio justifying any such diversion of water. The statute upon which plaintiff relies for its authority to carry its plan of development is Section 10128 of the Ohio General Code of 1910, which is quoted on pages 6 and 7 of plaintiff's original brief. This section authorizes plaintiff to enter upon private land for examination, surveying, &c., and provides that it

> "may appropriate so much thereof as is deemed necessary for the laying down or building of such tubing, conduits, pipes, dams, poles, wires, reservoir, plant and

power house as well as the land overflowed, and for the erection of tanks, and reservoirs for the storage of water for transportation and the erection of stations along such line or lines and the erection of such building as may be necessary for the purposes aforesaid."

This language is quite sufficient for the ordinary hydro-electric development where a dam is constructed to hold back the water and raise the head and where the water passes through the appropriate machinery and returns to the channel of the same stream so that ripairain owners below the dam are not deprived of the ordinary flow of the stream. There is no authority in this language for diverting the water from any stream into the channel of another stream or basin and any riparian owner below the dam is authorized to enjoin any company acting under the authority of this section from any such diversion of water.

In defendants' brief sur motion to dismiss it was suggested that the description of the land which plaintiff proposed to condemn was not sufficient. Plaintiff in its brief in opposition to this motion calls attention to the fact that the sufficiency of the description had already been passed upon by the State Court (see plaintiff's brief in opposition to motion to dismiss, page 34). It is true that at an early stage of this litigation defendants raised the question whether the description of the property which plaintiff proposed to condemn was sufficient under the Ohio statute. This was before any proof was taken and the Supreme Court of Ohio held that the description was sufficient to describe a definite tract of land. The point to which we wish to call attention in speaking now of this description is that there is nothing in the record to justify a description which would include land one hundred feet wide on each side of the river. Why not make it two hundred feet, or only fifty feet. There is nothing to show any necessity for limiting the tract to one hundred feet on each side of the channel, nor in fact for extending the tract to that width. The evidence shows that the description is arbitrary and without any foundation of necessity.

It results from what has been said above that if the question whether plaintiff established necessity for the appropriation cannot be considered as an independent and separate local question, broad enough to justify the decision of the State Court as a valid and good defense, and on that account this Court overrules the motion to dismiss, there still remains the motion to affirm, and we submit that this motion should be granted on the ground that plaintiff has failed to establish any necessity whatever for appropriating defendants' land.

V.

PLAINTIFF'S RIGHT TO CONDEMN IS NOT A RIGHT ENTITLED TO THE PROTECTION OF THE FEDERAL CONSTITUTIONAL GUARANTEES.

It is not every right that is entitled to the protection of the contract impairment clause of the Federal Constitution or to the due process clause of that Constitution. We admit that easements are entitled to this protection. Plaintiff has cited several cases where the right in question was the franchise of a street railway company to construct and operate a line of railway on a city street. These franchise rights are easements and are of sufficient dignity to secure the protection of the Federal guarantees. The following are cases of this kind.

New York Electric Lines Co. *vs.* Empire City Subway Co., 235 U. S. 179;
Russell *vs.* Sebastian, 233 U. S. 195;
Grand Trunk Ry. Co. *vs.* South Bend, 227 U. S. 544;
Hamilton G. & C. Traction Co. *vs.* Hamilton & L. Electric Transit Co., 69 Ohio State, 402;
Louisville Trust Co. *vs.* Cincinnati, 76 Fed. 296;
Boise Water Co. *vs.* Boise City, 230 U. S. 85;
Owensboro *vs.* Cumberland Telephone Co., 230 U. S. 58.

Practically all of the cases cited by plaintiff on this branch of its case relate to easements.

A liquor license is unquestionably a right or privilege but it has been held many times that a liquor license is not entitled to the protection of the contract impairment clause or the due process clause of the Federal Constitution. See the following cases:—

Board of Excise *vs.* Barrie, 34 N. Y. 657 (1866);
Martin *vs.* State, 23 Neb. 371 (1888), 36 N. W. 554;
People *vs.* Flynn, 184 N. Y. 579 (1906), 77 N. E. 1194;
La Croix *vs.* Couirs, 50 Conn. 321 (1882);
Voight *vs.* Board of Excise, 59 N. J. Law (1896), 36 Atl. 686;
Cassidy *vs.* Macon, 133 Ga. 689 (1909), 66 S. E. 941;
Hermandez *vs.* State, not reported (1911), 135 S. W. 170;
Cassidy *vs.* Drake, 154 Ky. 25, 156 S. W. 1032;
State *vs.* Ross, 177 Mo. App. 223, 162 S. W. 702.

In Metropolitan Board of Excise *vs.* Barrie, 34 N. Y. 659, the Court, in discussing a liquor license, said:—

> "These licenses to sell liquors are not contracts between the State and the persons licensed giving the latter vested rights protected on general principles and by the Constitution of the United States against subsequent legislation; nor are they property in any legal or constitutional sense."

A license to practice medicine comes in this same class. State Board *vs.* McCrary, 95 Ark. 511 (1910), 130 S. W. 544.

The right conferred upon railroads to consolidate with other railroads is also in this same class and is not entitled to protection against contract impairment or the due process clause.

Pearsall vs. *Great Northern Railway Co.*, 161 U. S. 646.

A public office is not such property. *Sumpter* vs. *State*, 81 Ark. 60, 98 S. W. 719.

See also the following cases:

People *vs.* Chicago, 242 Ill. 561, 90 N. E. 259;
State *vs.* Henderson, 145 Iowa 657, 124 N. W. 767;
Bonner *vs.* Belsterling, 104 Tex. 432, 138 S. W. 571;
Bowen *vs.* Russell, 272 Ill. 313, 111 N. E. 978, 980;
Atty. Gen. *vs.* Jochim, 99 Mich. 358, 58 N. W. 611;
State *vs.* Crumbaugh, 26 Tex. Civ. App. 521, 63 S. W. 925;
Moore *vs.* Strickling, 46 W. Va. 515, 33 S. E. 274;
State *vs.* Grant, 14 Wyo. 41, 81 Pac. 795.

The question presented is, therefore, whether the right to condemn is the same kind of a right as an easement or whether it is more analogous to a liquor license or a license to practice medicine.

There are a number of definitions of an easement in "Words and Phrases," Vol. 3. The first reads as follows:

> "An easement is a liberty, privilege or advantage which one may have in the land of another without profit."

It seems reasonably clear that a right to condemn is not an easement, but it is more analogous to the other rights mentioned which are not entitled to protection under the Federal Constitution. These views do not run counter to the decision in *Chesapeake & Ohio Canal Co.* vs. *Baltimore & Ohio Railroad Co.*, 4 Gill & Johnson 1, and other similar cases, where the issue presented was the respective rights of two similar corporations, each endeavoring to take the same property for its corporate purposes. In these cases the earlier right prevails, but the question whether the right of either company is entitled to protection under the Federal Constitution is not involved. Plaintiff seems to lay some stress upon the proposition that its right was prior in time and the statement appears in its brief that defendants con-

structed their improvements upon this property even after plaintiff had instituted this condemnation suit. As a matter of fact defendants' predecessor acquired this property before plaintiff was incorporated. This property was purchased by the Akron, Bedford and Cleveland Railway Company and conveyed at its request to Henry A. Everett, who held title for the company by deed dated December 14th, 1897. Plaintiff was not incorporated until the year 1908. The evidence shows that this property was purchased by defendants' predecessor for the purpose of developing power to be used for its corporate purposes. Reports of engineers upon the proper method of development were secured by defendants' predecessor and later, in the month of December, 1910, actual construction of defendants' power house was commenced and was well under way before this suit was instituted on January 20th, 1911. It is true that the title to the property was taken in 1897 in the name of Henry A. Everett, and that he conveyed it on December 20th, 1910, to the Northern Realty Company and that that company conveyed it on January 31st, 1911, to the Northern Power Company and the Northern Power Company conveyed it to the Northern Ohio Traction and Light Company on the twenty-fourth day of February, 1914. Although the Northern Ohio Traction and Light Company did not take the legal title until this later date, the record shows very clearly that the property has been owned by the Northern Ohio Traction and Light Company ever since it was organized, and by its predecessor company when it was purchased and title taken in the name of Henry A. Everett in 1897.

The defendants' ownership of the property therefore antedates plaintiffs' incorporation and right to condemn property for its corporate purposes and defendants' actual development of the property for its public use was begun before plaintiff commenced this condemnation suit. The issue presented on this branch of the case is whether, under these circumstances, plaintiff's right to condemn is of such a character that when it is denied, as it was by the judgment of

the State Court, he is entitled to appeal to this Court for protection under the Federal guarantees on the ground that his alleged contract has been impaired and that he has been deprived of his alleged property right without due process. We submit that plaintiff's right is not within any class of rights that is protected by the Federal Constitution.

VI.

Had not Defendant Devoted this Property to Public Use and, Independent of all other Questions, was not that a good Defense?

Defendant was duly incorporated under the laws of the State of Ohio as a Traction and Light Company and, under the statutes of that State, has the right of eminent domain. Plaintiff denies that defendant had any right to condemn this particular land for the construction of a power house and that, in the absence of such right of condemnation, defendant cannot withdraw this property from the right of plaintiff to condemn it. The statutes of Ohio conferring upon defendant the right to condemn property outside of municipalities are cited at page 109 of plaintiff's original brief, and it is there shown that defendant has the same right to condemn that is conferred upon steam railroads and that steam railroads have the right to appropriate land for

> "necessary sidetracks, depots, work shops, round houses and water stations, material for construction except timber," &c.

The right of condemnation conferred upon steam railroads is not limited to the right of way on which the tracks are constructed. They are authorized to condemn property for their other purposes, as, for instance, depots and work shops, round houses and water stations. Where the same right of condemnation is given to an interurban electric railway company the question presented is whether the Legislature did not intend to confer upon such companies the

right to condemn land for uses which are similar uses, where an electric interurban railway company is concerned, to the uses for which a steam railroad company needs depots, work shops, round houses and water stations. Does not a power house stand in the same relation to an electric interurban company that a work shop or a water station does to a steam railroad?

This question is a question of interpretation of a State statute conferring the right of eminent domain upon an electric interurban railway company. The State Court has passed upon this question adversely to the contention of plaintiff. Plaintiff contends, in order that he may maintain jurisdiction of this Court, that the State Court has held that defendants' use of this property is not a public use because it had not the right to condemn it. This means that, according to plaintiff's contention, the State Court has held that defendants did have the right to condemn this property. If that was the decision of the State Court, it must have been based upon the interpretation of this particular statute conferring the right of eminent domain upon electric interurban railway companies. Will this Court reverse a decision of the State Court upon the construction of a State statute and hold that an interurban electric railway company did not have the right of eminent domain under a State statute where the State Court has held that it did? This Court has held many times that it is bound by the decision of the State Courts in construing their own statutes and it has also held in many cases that where a State Court has held a use to be a public use, it will treat these decisions with very great respect as embodying the deliberate judgment and matured thought of the State Courts, although on this point this Court holds that it is not bound by the decisions of the State Court. See following cases:—

Fallbrook Irrigation District *vs.* Bradley, 164 U. S. 111;

Clark *vs.* Nash, 198 U. S. 361;

Strickley *vs.* Highland Boy G. M. Co., 200 U. S. 527;

Harston *vs.* Danville & W. R. Co., 208 U. S. 578;
Union Lime Co. *vs.* Chicago & N. W. R. Co., 233 U. S. 211;
O'Neill *vs.* Lima, 239 U. S. 250.

In Strickley *vs.* Highland Boy G. M. Co., 200 U. S. 527, the syllabus reads:—

> "The condemnation of a right of way across a placer mining claim for an aerial bucket line of a mining corporation cannot be said to be a taking of private property for private use in defiance of the United States Constitution, Fourteenth Amendment, if authorized by the construction given by the State Courts to the provisions of State legislation for the exercise of eminent domain in behalf of certain uses declared to be public."

Plaintiff further contends that even though defendant has devoted this property to a pubic use, it is none the less entitled to condemn it. This, again, is a question where this Court will follow the decision of the State Court.

We respectfully submit that our motion to dismiss for want of jurisdiction should be sustained, but that if that motion is overruled, then that the judgment of the State Court should be affirmed.

JOSEPH S. CLARK,
JOHN C. WEADOCK,
T. H. HOGSETT,
Attorneys for Defendants in Error.

CUYAHOGA RIVER POWER COMPANY *v.* NORTHERN REALTY COMPANY ET AL.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

No. 342. Argued May 8, 9, 1917.—Decided June 4, 1917.

The Supreme Court of Ohio, after refusing to review a judgment of the Ohio Court of Appeals by certiorari, dismissed a writ of error to the judgment for want of jurisdiction. *Held*, that under Jud. Code, § 237, the writ of this court ran properly to the Court of Appeals. *Stratton* v. *Stratton*, 239 U. S. 55.

In a controversy in the courts of Ohio over the right of one corporation to condemn land of another, *Held*, that the existence of the petitioning corporation, its right to condemn, its inability to agree as to compensation to be paid for the property, and the necessity for the appropriation, were matters depending purely on the local law.

It not appearing otherwise whether the judgment of the Ohio Court of Appeals was based on provisions of local law or upon a question which was raised under the Federal Constitution, *semble*, that the action of the Supreme Court of the State in dismissing a writ of error to the judgment for want of jurisdiction, upon the express ground that no question under the state or federal constitutions was involved in the judgment, would warrant this court in concluding that the judgment had a non-federal basis only.

Where the judgment of a state court may rest upon either a federal or a non-federal ground, and the basis actually adopted does not appear by the state court's opinion or otherwise, this court has no jurisdiction to review.

Dismissed.

THE case is stated in the opinion.

Mr. Carroll G. Walter, with whom *Mr. William Z. Davis* and *Mr. John L. Wells* were on the briefs, for plaintiff in error.

Mr. Joseph S. Clark, with whom *Mr. John C. Weadock* and *Mr. T. H. Hogsett* were on the briefs, for defendants in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The Cuyahoga River Power Company, plaintiff in error, was chartered under the laws of Ohio to build and maintain a system of dams, canals and locks in the Big Cuyahoga River for the generation of electricity for light, heat and other purposes. The corporation was granted authority to acquire by condemnation or purchase property necessary for the conduct of its business. In January, 1911, the Power Company commenced this action against the Northern Realty Company, one of the defendants in error, to condemn a large tract of land owned by it adjacent to the river. After the suit was brought this land was sold by the defendant company and was ultimately acquired by The Northern Ohio Traction & Light Company, chartered by the State to operate an interurban electric railway and upon the land thus bought by it after the commencement of the suit that company for its charter purposes built and was operating two large power plants.

Upon its own motion the Traction Company was made a party to the pending suit for expropriation. In conformity with the Ohio statutes regulating the procedure in eminent domain, four preliminary questions were required to be passed upon by the court without a jury, and if decided in favor of the plaintiff, a jury was then required to determine the question of compensation. The four preliminary questions were these: (a) The existence of the petitioning corporation, (b) its right to make the appropriation, (c) its inability to agree as to the compensation to be paid for the property and (d) the necessity for the appropriation. The defendants not only relied upon these four preliminary propositions but also resisted the taking on the ground that a condemnation of the land under the petition of the Power Company would be incon-

sistent with and destructive of the public use to which the land had been applied by the Traction Company. The court did not come to a jury trial on the question of compensation because, after hearing evidence on the preliminary issues, on motion of the defendants it entered an order dismissing the petition, no reason for such decision having been expressed.

The case was taken to the Court of Appeals, it being assigned as error that the trial court had erred in its rulings on the four preliminary questions, and it was further alleged that the refusal of the court to order the condemnation of the land upon the theory that it was not subject to be condemned because after the suit had been brought it had been acquired by the Traction Company and by it dedicated to a public use, constituted an impairment of the contract rights of the plaintiff and a taking of its property without due process of law in violation of the Constitution of the United States. Following a judgment of affirmance without a written opinion, the Power Company applied to the Supreme Court of the State to direct the Court of Appeals to certify the record for review, which was denied, and a writ of error which was prosecuted to the Court of Appeals from the Supreme Court was dismissed for want of jurisdiction for the stated ground that the case did not "involve any question arising under the Constitution of the United States or the State of Ohio." Because of the asserted denial of the alleged federal rights referred to the case is here, the writ of error being directed to the Court of Appeals.

Our jurisdiction to review is challenged by a motion to dismiss based upon two grounds which we consider separately.

1. It is contended that as under § 237 of the Judicial Code we have jurisdiction to review only final judgments of the highest court of the State in which a decision could be had, the writ of error should have been prosecuted to

the Supreme Court of Ohio. In view, however, of the denial by that court of the application to direct the Court of Appeals to certify the record for review, and its order dismissing the writ of error for want of jurisdiction, the contention is without merit. *Stratton* v. *Stratton*, 239 U. S. 55; *Valley Steamship Company* v. *Wattawa*, 241 U. S. 642; *Second National Bank* v. *First National Bank*, 242 U. S. 600.

2. It is contended that, conceding the existence of federal questions in the case, nevertheless as there were independent state grounds broad enough to sustain the judgment, there is no jurisdiction. We think the contention is sound. Despite some suggestion to the contrary it is certain that the four preliminary propositions concerned purely local law and, if decided adversely to the plaintiff, were broad enough to sustain the judgment irrespective of the merits of the federal question which it is insisted was involved in the particular defence made by the Traction Company concerning the public character of the use to which it had applied the property and the consequent want of authority to take it for the benefit of the Power Company, which was submitted to the court along with the preliminary questions. Leaving aside any inference sustaining the view that the Supreme Court treated the preliminary questions as having been adversely decided and the constitutional questions as having been eliminated when it refused to order up the record for review, that conclusion is sustained by its express declaration made in refusing the writ of error that there was no question under the state or Federal Constitution involved,—a conclusion which if it had not been in so many words declared would by necessary implication have resulted from the dismissal of the writ of error for want of jurisdiction since under the constitution and laws of Ohio if a question under the Constitution of the United States or the state constitution had existed, the duty to take jurisdiction would have been obvious.

But assuming that we are not controlled by the statement of the Supreme Court of Ohio on this subject and must determine it upon our own conception as to what was done by the court whose judgment is under review, the result would be the same. We so conclude because looked at from the point of view of the action of the trial court and of the Court of Appeals, the case presents the single question of what principle is to be applied where from an absence of an opinion expressed by the court below it is impossible to say whether its judgment was rested upon state questions adequate to sustain it independent of the federal questions or upon such federal questions, both being in the case. But the rule which controls such a situation has long prevailed and was clearly expressed in *Allen* v. *Arguimbau*, 198 U. S. 149, 154–155, where a writ of error to the Supreme Court of Florida was dismissed, as follows: "The Supreme Court of Florida gave no opinion, and, therefore, we are left to conjecture as to the grounds on which the pleas were held to be bad, but if the judgment rested on two grounds, one involving a Federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a Federal question is sufficient in itself to sustain it, this court will not take jurisdiction. *Dibble* v. *Bellingham Bay Land Company*, 163 U. S. 63; *Klinger* v. *Missouri*, 13 Wall. 257; *Johnson* v. *Risk*, 137 U. S. 300." *Bachtel* v. *Wilson*, 204 U. S. 36; *Adams* v. *Russell*, 229 U. S. 353.

Dismissed for want of jurisdiction.

MR. JUSTICE DAY and MR. JUSTICE CLARKE took no part in the consideration and decision of this case.